

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

CITY OF ROCKFORD,) Docket No. 17 CV 50107
)
Plaintiff,) Rockford, Illinois
) Wednesday, August 3, 2022
v.) 11:00 o'clock a.m.
)
MALLINCKRODT ARD, INC.,)
et al.,)
)
Defendants.)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE LISA A. JENSEN

APPEARANCES:

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1 THE CLERK: Now calling Case No. 17 CV 50107, *City of*
2 *Rockford v. Mallinckrodt ARD Incorporated, et al.*

3 THE COURT: Can I have the appearances of the
4 parties, please, starting with the plaintiff.

5 MR. HAVILAND: Good morning, Your Honor. Don
6 Haviland from Haviland Hughes for the City of Rockford and the
7 class.

8 MR. PLATT: Good morning, Your Honor. Bill Platt for
9 plaintiff, City of Rockford, and the class.

10 THE COURT: Okay. Good morning.

11 MS. MCCAFFREY: Good morning, Your Honor. Meghan
12 McCaffrey for the Express Scripts entities. With me are my
13 colleagues Mr. Eric Lyttle, Matt Hamann, and Michael Soyfer,
14 as well as Mr. Ohlander.

15 THE COURT: Okay. Good morning.

16 MR. MINCIELI: Good morning, Your Honor. Jonathan
17 Mincieli for Rockford Consulting Brokerage with respect to the
18 motion.

19 THE COURT: Okay. Good morning.

20 And then we have?

21 MR. SHAPLAND: Good morning, Your Honor. Eric
22 Shapland with Joel Huotari on behalf of third party
23 Mallinckrodt.

24 THE COURT: Okay. All right. Let's deal with the
25 Rockford Consulting matter first, since Mr. Mincieli won't

1 have to hang around if we get that resolved --

2 MR. MINCIELI: Thank you, Your Honor.

3 THE COURT: -- unless he wants to.

4 MR. MINCIELI: I appreciate that.

5 MS. MCCAFFREY: And, Your Honor, my colleague

6 Mr. Soyfer will be handling that.

7 THE COURT: Okay. Great.

8 MR. SOYFER: So, Your Honor, as you saw last Friday,
9 Mr. Mincieli informed us he was no longer representing
10 Rockford Consulting. He contacted me yesterday and told me
11 that he is now again representing Rockford Consulting, has
12 been able to locate the production. So we have a narrower
13 request for Your Honor than what is in our briefs.

14 THE COURT: Okay. All right.

15 MR. SOYFER: So Mr. Mincieli has not been able to
16 commit to any date by which he will be able to produce those
17 documents. So we are requesting that the Court set a deadline
18 of 14 days from today for Rockford Consulting to produce those
19 documents.

20 Plaintiff, City of Rockford, has also indicated that
21 it may be willing to agree to the production of documents
22 withheld under the deliberative process privilege on similar
23 terms to our prior stipulation with them, but it will need to
24 review the documents first.

25 THE COURT: Okay.

1 MR. SOYFER: So we would request that Your Honor set
2 a deadline of five days from the date the documents are
3 produced for those to happen. That is largely because this
4 month we will be deposing our first Rockford witness, on
5 August 23rd, and so we would like to have those documents in
6 time to be able to review them and use them at the deposition
7 if necessary.

8 THE COURT: Okay. And what's your position on that,
9 Mr. Mincieli?

10 MR. MINCIELI: Largely, there is -- I don't disagree
11 with much of what Mr. Soyfer said. What I will say, Your
12 Honor, is I didn't think I would be back in this courtroom on
13 this case, I will be honest with you, although it is a
14 pleasure to see you. You know, my firm withdrew from this
15 litigation some time ago. I learned in, I think, June of this
16 year that ESI and its counsel had never accessed or opened up
17 the Rockford Consulting documents that were produced two years
18 ago and in compliance with this subpoena.

19 THE COURT: My understanding is there was not a
20 passcode or something that was passed along?

21 MR. MINCIELI: It was not passcode protected. We
22 produced it. The subpoena was fully complied with in
23 accordance with Your Honor's order. It was just never opened
24 or looked at, and now this is now becoming mine and Rockford
25 Consulting's problem again.

1 So I reached out to Mr. Soyfer yesterday, and while
2 we did withdraw from the litigation, because of the motion, I
3 felt it necessary to be here on behalf of Rockford Consulting
4 again.

5 THE COURT: Thank you for that.

6 MR. MINCIELI: Until this week, I did not have access
7 to those documents.

8 Yesterday, I spoke to Mr. Soyfer, and I said we are
9 happy to reproduce. I need some time to do that because they
10 are on a hard drive now. I don't know, frankly, what format
11 they are in. I need to get that hard drive to the same vendor
12 we used last time to tell me how can we produce these again.

13 THE COURT: All right. So 14 days to produce them;
14 does that seem doable?

15 MR. MINCIELI: Well, that's the problem, is I don't
16 know if 14 days will do it because once the vendor looks at
17 it, frankly, Your Honor, I don't know if that hard drive, they
18 could say, "Oh, here is the production, we can just produce it
19 again," or if it is in some other form that requires
20 extraction and some sort of review again. I, frankly, don't
21 know the answer to that.

22 THE COURT: I'm going to say 14 days to get it
23 produced. If, for some reason, it can't be produced in 14
24 days, you are going to work out an arrangement with defense
25 counsel. I'm sure if there is a good reason why it can't be,

1 defense counsel will be accommodating. In the unlikely event
2 that the parties cannot agree, then there will be a motion
3 filed to extend that time period with the reasons for doing
4 that.

5 MR. MINCIELI: Thank you, Your Honor. I don't think
6 that's unreasonable.

7 That being said, because we are now reinventing the
8 wheel, we are doing the same exact thing that was done before,
9 there will be some cost incurred to get this to the vendor to
10 review this, to figure out how we can produce this. I don't
11 know what that cost is going to be, but it is our position
12 that Rockford Consulting should not bear that cost because it
13 has already spent a lot of time, effort, and cost in
14 responding to the subpoena the first time, which was just
15 simply not opened by ESI. So now we are here again to remake
16 the wheel, essentially, and it is our position that Rockford
17 Consulting should not have to bear that cost.

18 THE COURT: I would think that that would be a
19 reasonable request; however, I don't have a motion for fees
20 and costs in front of me. I would hope that I don't get one
21 and that the parties would work that out. If not, bring
22 something forward.

23 Five days after the production, you are going to make
24 a decision on whether you are going to stand on your
25 objections. I will give you a little bit of a hint of my

1 ruling and that is I'm not sure you have a deliberative
2 process privilege. That's the City of Rockford's, and they
3 have already agreed to waive it. So I would fully expect that
4 those documents would be produced under the same arrangement
5 that Rockford made.

6 With respect to the attorney-client privilege
7 documents, if you are going to stand on your objection, then I
8 want those produced to me for in camera inspection, and I want
9 an updated privilege log that specifically tells me with
10 respect to each of the documents the basis for the
11 attorney-client privilege, okay?

12 MR. MINCIELI: Thank you, Your Honor. I appreciate
13 your guidance.

14 THE COURT: That should resolve everything on that
15 one. Thank you.

16 I am going to turn now to the issue of Express
17 Scripts' motion to compel documents from the City of Rockford.

18 MR. PLATT: Good morning, Your Honor.

19 THE COURT: Good morning.

20 MR. HAMANN: Good morning, Your Honor. Matthew
21 Hamann on behalf of the Express Scripts entities.

22 You know, our request here, I think, is pretty
23 simple. We need Rockford to actually go search for and try to
24 find the custodial documents for the two individuals who are
25 the subject of our motion, Ms. Jones and Ms. Johnson.

1 Rockford admits that they have custodial documents for these
2 two individuals. They admit that they have saved employees'
3 documents and may have saved employees' documents in other
4 current employees' files. So what we need them to do is just
5 actually go search and try to find if there are additional
6 custodial documents for these two individuals that are out
7 there.

8 Frankly, the searches so far are insufficient that
9 they have done, at least as they have relayed them to us. You
10 know, they haven't done any search after we alerted them to
11 this issue in April. There is no indication that the initial
12 searches that they did back in 2020 would have uncovered these
13 documents that are in other employees' files. First of all,
14 they don't say they would have in their briefing -- or in
15 their affidavit, and, frankly, we know that they wouldn't have
16 discovered it because they didn't know about the issue until
17 we told them about it in April.

18 So I think at bottom, our primary request here is
19 that they go back and actually do an additional search to try
20 to find additional custodial documents for these two
21 individuals. We think that also will require them to update
22 their affidavit that they had submitted pursuant to your order
23 to confirm that they do, in fact, have custodial documents for
24 these two individuals, and then, of course, certainly our view
25 at the moment, since they haven't actually gone through the

1 process of searching for their documents, they can't affirm
2 that they have collected, reviewed, and produced responsive
3 documents, all the responsive documents for the agreed upon
4 custodians, like they did in their -- stated in their
5 affidavit.

6 And I guess there is one final issue, which is the
7 metadata production issue. So Rockford produced metadata for
8 most but not all of the documents that they had waived the
9 deliberative process privilege over.

10 THE COURT: My understanding is they have agreed to
11 produce the remaining, and I will say -- so I think we have an
12 agreement on that. It is just the time period.

13 MR. HAMANN: Yes. We would just ask Your
14 Honor -- they said, I think, they can do it by August 12th,
15 and we would just ask Your Honor to enter an order requiring
16 them to do that by August 12th.

17 THE COURT: I will.

18 Fourteen days to get the metadata?

19 MR. PLATT: Yes. Your Honor, I think there was an
20 oversight on that.

21 First of all, I just want to make the record clear.
22 The City of Rockford did not waive the deliberative process
23 privilege. To the extent it exists, they just agreed to
24 produce documents and protect the waiver for issues that might
25 come down the line.

1 THE COURT: I understand, and I don't mean to say
2 that you waived. What I mean is for purposes of this
3 litigation, you are not standing on the process --

4 MR. PLATT: Correct.

5 THE COURT: -- based on the agreement, and as a
6 result of that, that agreement should govern.

7 MR. PLATT: Right.

8 And what we will do is we will then -- with regard to
9 Rockford Consulting, because that's our privilege, we will do
10 the same thing if it is okay with counsel. We will just
11 submit a supplement to our non-waiver agreement with a list of
12 the documents by Bates label that are covered by the
13 non-waiver agreement.

14 THE COURT: I think that's acceptable because I think
15 that's what you were asking for to begin with.

16 MR. HAMANN: That is what we were asking for.

17 THE COURT: Absolutely.

18 MR. HAMANN: And I think Your Honor already addressed
19 the timeline for that, and we would ask for five days.

20 THE COURT: Yes. So we are good with that, but thank
21 you for clarifying that. I was certainly not trying to say
22 that there was an outright waiver, but there certainly was a
23 waiver of the privilege for purposes of this litigation based
24 on your agreement.

25 Let me see if I can cut to the quick on the issue of

1 the affidavit. So there were two affidavits, and you saw the
2 second affidavit that they filed.

3 MR. HAMANN: Yes, that's correct.

4 THE COURT: Mister -- I'm not even going to try to
5 pronounce his last name.

6 MR. HAMANN: Me neither, Your Honor.

7 THE COURT: It starts with a C.

8 My understanding is there are no -- the custodians,
9 there are no custodial files for the two persons that you are
10 looking for, that's according to both affidavits, that when
11 the requested terms were run against some of the other
12 custodial files, the terms turned up documents that involved
13 the two custodians who no longer have files and that that's
14 how those showed up. That's my understanding.

15 Do I have it correct so far?

16 MR. HAMANN: So I think I understand it just slightly
17 different, Your Honor, at least in terms of what we are
18 looking at.

19 So our understanding is that basically when these two
20 individuals left the City of Rockford, left their employment,
21 the City of Rockford saved their documents. So they didn't
22 necessarily delete them, and they might have saved them with
23 other employees' files. So, for example, that's how we came
24 to know about this issue is that these documents were saved in
25 primarily an individual named Brittany Krutz's custodial file.

1 So when you look at the file path, you see that these
2 are -- for example, it will say "Jessica's personal file."

3 THE COURT: Well, they wouldn't be specifically
4 saved. They would be in -- let's say Ms. Jones is the
5 custodian whose file you want searched, but they are saying
6 there is no longer a custodial file for Ms. Jones. If they
7 run your search terms in Ms. Smith's file, they might come
8 across Ms. Jones' emails between Ms. Smith and Ms. Jones, not
9 because they specifically saved Ms. Jones' files, but because
10 they saved Ms. Smith's files, right?

11 MR. HAMANN: Well, so as I understand it, they did
12 specifically save their documents.

13 THE COURT: Okay. Let me check with them.

14 MR. PLATT: That's not true. I made the mistake
15 during a meet-and-confer to say something similar to that.

16 When the employee leaves the city, they save the
17 files for 30 days, and another, maybe a Ms. Smith, has access
18 to those files because they replaced them in their job. To
19 the extent that they want them saved, they keep them. They
20 would then become Ms. Smith's custodial documents, and after
21 30 days, per the policy of the city, the rest are deleted.
22 They are gone. The files are gone. So these files don't
23 exist, and I have two affidavits that say that.

24 MR. HAMANN: So what we are looking for -- and I
25 think that's helpful because we are talking about Ms. Smith,

1 for example, who is not a custodian in this case.

2 What we want them to do is check to see does
3 Ms. Smith have Jessica Jones' documents or Betty Johnson's
4 documents. That is, at bottom, what we are looking for.

5 MR. PLATT: Your Honor, that is a humongous burden on
6 the City of Rockford. To expect them to -- they are going to
7 have to go through everybody's files.

8 Now, what the declaration of Mike C., as I will call
9 him, said was that they searched the email addresses, right?
10 They searched the email addresses for Ms. Jones and
11 Ms. Johnson, I think, and there was no custodial files. They
12 went above and beyond to produce something like 8,000 or 9,000
13 documents from those email addresses.

14 THE COURT: So if they search --

15 MR. PLATT: So they are asking you to have us go to a
16 non-custodian, which would mean everybody else in the City of
17 Rockford, and search for files that don't exist anymore.

18 THE COURT: So you are saying you have searched for
19 Johns and Jones -- is that the names of them?

20 MR. HAMANN: Johnson and Jones.

21 MR. PLATT: Johnson and Jones.

22 THE COURT: Johnson and Jones.

23 You searched for Johnson and Jones' email address?

24 MR. PLATT: Oh, absolutely. It was part of the
25 search term.

1 THE COURT: So why wouldn't that capture anything,
2 regardless of -- how would that be missing anything?

3 MR. HAMANN: So I think the issue is probably more
4 saved documents that seem to be saved in other individuals'
5 files.

6 THE COURT: But what would be saved in other
7 individuals' files?

8 MR. HAMANN: So they appear to have just saved, for
9 example, Ms. Jones' documents in Ms. Krutz's files. So, for
10 example -- and we know this is the case, like it wasn't -- for
11 example, it wasn't correspondence that Ms. Krutz had with
12 Ms. Jones. One of the reasons we know this, for example, is
13 that Ms. Jones left before Ms. Krutz even came to the City of
14 Rockford.

15 THE COURT: Did she take over for her? Is that why
16 she --

17 MR. PLATT: As I understand it, the successor
18 employee has access to the files, and they are able to take
19 from those files what they think are appropriate to do their
20 job. Ms. Krutz -- there are a lot of HR people in this
21 custodial list, and I think these employees, these former
22 employees, were part of the HR department. So, yes, they
23 would go into a succession.

24 THE COURT: So who --

25 MR. PLATT: So Kim Ryan --

1 THE COURT: Let me -- I'm sorry. I just have a lot
2 on my plate today, so I'm trying to streamline it.

3 MR. PLATT: Yes.

4 THE COURT: Who would be the people who would have
5 access to Ms. Johnson and Ms. Jones' files for purposes of
6 being able to take what they want?

7 You should be able to figure that out.

8 MR. PLATT: Today, nobody.

9 THE COURT: Right.

10 But how about when she left?

11 MR. PLATT: In 2010, in 2015, likely the individuals
12 where the emails appeared. The custodians where emails
13 appeared in their search, in their files, they would be the
14 ones. Now, a lot of them are gone. So we are being asked to
15 go back to 2010, Your Honor. So we have not only produced all
16 of the files, the declarations made clear everything was
17 searched using the search terms. Everything was searched, not
18 just the custodians. Everything. There was like 13 gigabytes
19 worth of stuff, 5 million pages of documents.

20 THE COURT: If everything was searched --

21 MR. PLATT: That's what John and Kelly's affidavit
22 says.

23 THE COURT: If everything was searched using the
24 search terms you requested across everyone, what more is there
25 to search?

1 MR. HAMANN: Well, as I understand it, they didn't
2 run -- I assume they didn't run search terms across literally
3 every document in the City of Rockford. I assume they, and I
4 think this is what the new affidavit says, is that they
5 collected the files first and then would have run the search
6 terms for the particular custodians.

7 So what would be left is if -- you know, Mr. Platt is
8 saying it's likely that the files went to these individuals.
9 At bottom, what we are asking for is that they figure out who
10 else might have had their files and look to see if those files
11 are in there.

12 THE COURT: That's reasonable.

13 Do an investigation based upon who would have had
14 access to these folks' files -- you are telling me it is
15 typically successors -- and search those files using the
16 search terms that you have requested. That should be
17 fairly --

18 MR. PLATT: So, Your Honor, I will wrap this up, and
19 I will just ask you if it is okay to do the following.

20 So I will contact the head of HR for the City of
21 Rockford, who I believe was there in 2010 when the first
22 employee left, and was obviously there in 2015, and I will ask
23 her if she is able to determine who the successor was and
24 whether or not they took on some of these files of their own.

25 THE COURT: Right. And it would be --

1 MR. PLATT: And if the answer is no, that's all I can
2 do. I just want to stress it is very clear from
3 Mr. Mincieli's affidavit in 2020, which was ordered by the
4 Court, that everything was reviewed. So we had a
5 meet-and-confer. I tried to figure out what they were
6 referring to with this concept that certain people have files
7 of other people and there must be files that exist. I went to
8 our vendor, for a fee -- there is a cost associated with
9 that -- and had them do a declaration, sort of reinventing the
10 wheel from 2020 again, and this is what we got with this
11 declaration, and both of them say consistently that no more
12 documents exist. But I will still, that having been said, go
13 back to the client.

14 I don't know if you want a status filing?

15 THE COURT: I want an affidavit filed by the HR
16 person with respect to whether the names of the folks who were
17 the successors or otherwise, or she is -- even if they weren't
18 the successors, if she is aware that they had access to their
19 files, she is going to list those names, and they are going to
20 be searched, okay?

21 MR. PLATT: Okay. Thank you, Your Honor.

22 MR. HAMANN: Thank you, Your Honor.

23 THE COURT: Let's see. How soon? I would like to
24 have a time period on that.

25 MR. PLATT: I always like more time. If we

1 start -- how about by next Friday?

2 THE COURT: Okay.

3 MR. PLATT: It shouldn't take me that long, but I
4 just want to be --

5 THE COURT: By the 12th, August 12th.

6 MR. HAMANN: Thank you, Your Honor.

7 MR. PLATT: Thank you, Your Honor.

8 THE COURT: All right. I am now going to the issue
9 of the 30(b)(6).

10 MS. MCCAFFREY: Your Honor, may I remove my mask?

11 THE COURT: Absolutely.

12 MR. HAVILAND: I would like to do the same, Your
13 Honor.

14 THE COURT: Yes.

15 MR. HAVILAND: Thank you.

16 So, Your Honor, this is Rockford's motion, and it
17 dates back to May 6th. It's a corporate designee motion that
18 is -- or it was a corporate designee notice that is done in
19 virtually any antitrust case starting with the data to
20 understand how the defendant company maintains data files, how
21 they are used, how they are assembled, and basic, basic
22 information. I think you probably saw, Judge, we had asked
23 the defendant to just produce a record, lay it out, if they
24 have a dictionary, some type of flashlight. This has come to
25 motion, Judge, because my expert had to go forward in the

1 blind, take an opinion based upon what he believes the data
2 says, and he will be subject to cross-examination this month
3 without having the facts.

4 THE COURT: Let me do this -- and, again, I have some
5 questions. I have spent a lot of time with everything that
6 you have provided to me.

7 When you are talking about your expert, Mr. Haviland,
8 you are talking and wanting to have some questions about the
9 data with respect to your Exhibit A. You are talking about
10 just with that piece of it. You are talking about those 53
11 pieces of, I guess we will call them, data sets that you have
12 identified on pages 4 and the top of page 5?

13 MR. HAVILAND: With the additional proviso that if
14 there is additional data, and, Your Honor, the interrogatory
15 answers, which we are going to get to, in the interrogatory
16 responses, Express Scripts identified additional data.

17 So, again, we don't know what we don't know, but we
18 would want to include anything that relates to Acthar sales,
19 rebates, and the like. So this was an attempt to tell the
20 defendant "This is what we think you produced in terms of
21 sales, reimbursement, and the like."

22 THE COURT: All right.

23 MR. HAVILAND: So you are correct with some
24 additional --

25 THE COURT: I'm prepared to rule on No. 15, and I am

1 going to rule that that is an appropriate request limited to
2 the questions A through G, although I had two questions.

3 A, a record layout or legend for each data set, I
4 would assume, to the extent there is a written legend, that
5 that would be appropriate. You are not expecting the deponent
6 to sit there and read it to you. You would rather have the
7 legend, right.

8 MR. HAVILAND: Judge, again, typically, the lawyers
9 get together. They exchange this information. We then have
10 it in advance to ask questions. But we would need to have
11 that so our expert could then fine-tune questions.

12 And let me just -- you probably know this, Judge.
13 There is a huge data file that runs on for 160, 180 character
14 positions. They are not self-described. They have codes up
15 top, shorthands. You may think that it relates to the AWP,
16 but they may not be how they are interpreting the data. The
17 layout or the dictionary, whatever you call it, gives you that
18 window, but there are follow-up questions in terms of what
19 those fields actually populate. So without that, it is going
20 to be a longer deposition.

21 THE COURT: Well, it is not going to be so long
22 because it is going to be limited to the topics that are here,
23 okay? So it may be long, but it is going to be limited to
24 these topics.

25 MS. MCCAFFREY: Your Honor, if I may?

1 THE COURT: Yes.

2 MS. MCCAFFREY: We have explained to the plaintiffs
3 the Express Scripts entities don't actually maintain data
4 dictionaries. What I offered to do back in May was to provide
5 for counsel, to identify the data fields they had questions
6 about, which, as Mr. Haviland just said, even one of these
7 files has hundreds of data fields. That's just one. That's
8 not the 60-plus that are identified here. But I asked him to
9 provide that, and we would work with them to get them written
10 descriptions of what each of those fields are. That was
11 rejected. Express Scripts doesn't maintain data dictionaries
12 in the ordinary course.

13 What I have been able to locate and which was
14 produced to plaintiffs in 2020 is a version of a data
15 dictionary maintained by UBC, which we obviously will point
16 them to in connection with that, but even that is, I believe,
17 old.

18 THE COURT: And by "data dictionary," you are
19 referring to what would be responsive to A, a record layout or
20 legend?

21 MS. MCCAFFREY: To A, that's correct, Your Honor.

22 THE COURT: So you can only produce what you have,
23 right?

24 MS. MCCAFFREY: But my concern -- I will tell you
25 what my concern is with this. Each one of these files can

1 literally have hundreds of data fields, and so what this is
2 asking for is to prepare a witness to sit and testify on,
3 like, possibly thousands of data fields. So I'm concerned
4 that this will be difficult for us to do.

5 What I have suggested and what I think is the best
6 course of action, at least as to that, is that the plaintiffs
7 provide specific data fields that they have questions on
8 because all of these data fields are not relevant to what is
9 happening with class certification and what their expert needs
10 to do. So if they can identify the specific data fields that
11 they would like information on, we can provide a written
12 summary of what each of those fields is meant to be, like the
13 definition, and then they can have that in advance of the
14 deposition, which I think would resolve A.

15 I have a concern because it is going to
16 be -- actually, a memory test is right -- extremely difficult
17 for a witness sitting in a deposition to be able to do that.

18 THE COURT: So, Mr. Haviland, I am already ruling
19 that you get the information B through F, right? I would
20 assume that you want this witness prepared to be able to
21 answer these questions for you because if he is not prepared,
22 and he doesn't have an idea of what you are going to ask, you
23 are not going to get the information you ask.

24 So why wouldn't it be appropriate for you to further
25 limit these documents that you are going to be asking about to

1 let the witness know within this field what parts are you
2 going to be asking about so he is prepared?

3 MR. HAVILAND: So, Judge, we did that. We actually
4 thought about this for a long time. You notice it didn't go
5 out until May, and if you read topics 1 through 14, you will
6 see what we did. We said, "Give us a total volume of sales by
7 year, but indication, by state." It is a nationwide class
8 with individual state classes. And you can read what we did.
9 There is a logical presentation: Sales between government and
10 private, the identities of the payors, rebates.

11 THE COURT: Right. And I'm going to get to all of
12 that. But I'm talking about -- here's the problem: I don't
13 know what these documents are. I mean, what are they?

14 MR. HAVILAND: They are data fields, Judge, and they
15 are very difficult to understand, but it is a data dump. So
16 we asked interrogatories on this. We asked requests for
17 production on this. We are not getting simple answers.

18 THE COURT: Tell me what it is. Tell me what is
19 "Express Scripts 0582508, Where TRC Low-Margin Drug Claims."

20 MR. HAVILAND: I have no idea.

21 THE COURT: What is that?

22 MR. HAVILAND: I know that it is --

23 THE COURT: What did you get? Did you get like a
24 spreadsheet?

25 MR. HAVILAND: A massive database, Judge. A

1 massive -- some of these are 50, 60, 100 gigabyte or
2 megabyte --

3 THE COURT: What are these, Ms. McCaffrey?

4 MS. MCCAFFREY: This is the data files that are
5 responsive to plaintiff's 400-plus discovery requests that are
6 a burned, scorched-earth method to find anything and
7 everything relating to Acthar. So this is exactly what
8 plaintiff has requested. There are five Express Scripts
9 entities, three or four of whom independently maintain all the
10 different sets of data on Acthar. That is exactly what this
11 is. So this is claims data. This is rebates data. This is
12 historical claims data. This is CuraScript distribution data.
13 This is Accredo pharmacy claims data, the UBC database, the
14 hub operation. That's what this data is.

15 This is not a data dump. Frankly, the suggestion
16 that it is is simply wrong. What this is is the data that is
17 responsive to Mr. Haviland's request.

18 So, again, if 1 through 14, for example, are the
19 fields that they are looking for to be able to do that, maybe
20 that is how we answer 15(a), so which field relates to sales,
21 which field relates to government, how do you identify
22 government purchasers, commercial purchasers. But that's not
23 what plaintiff has told us.

24 We have tried to meet and confer. We have tried to
25 get this down to a reasonable subset, and we are just not

1 there.

2 THE COURT: I mean, I just don't know, Mr. Haviland,
3 how -- you are not going to get a -- you are just not going to
4 get what you want this way, I don't think. I mean, I don't
5 know how you could.

6 MR. HAVILAND: Judge, I'm struggling with the tools
7 that I have. I have an interrogatory where I have asked these
8 specific questions. I have requests for production. Counsel
9 said data dump. That's what it is.

10 THE COURT: So --

11 MR. HAVILAND: And so there is going to be an expert,
12 Your Honor, for that side who is going to have the benefit of
13 all you are hearing. It is going to be streamlined, and that
14 expert, after the close of discovery, is going to come forward
15 with a position on the economics of this case. It will be too
16 late for the plaintiff to figure it out.

17 THE COURT: Right. But you can tell me that, and you
18 can be upset, and you can get all frustrated, but I am trying
19 to help both parties here. I'm trying to help you get the
20 information you want and Ms. McCaffrey to know how to prepare
21 her witnesses, and if I just say present somebody who can talk
22 about all these giant data sets, without knowing specifically
23 what you want to know about them, you are not going to get
24 what you want.

25 MR. HAVILAND: Judge, there is somebody in each

1 company that knows this information. That's how
2 Ms. McCaffrey can speak to that.

3 THE COURT: Knows what information? Knows what's in
4 these files?

5 MR. HAVILAND: So, Your Honor, you asked about the
6 low-margin drug claims, okay?

7 THE COURT: All right.

8 MR. HAVILAND: Now, what I can point out to you, it
9 is a standalone series, low-margin drug claims, okay? It is
10 Acthar sales. What does "low margin" mean, okay? Is it
11 because of a discount? Is it because of a rebate, a
12 charge-back? We have no idea from the data. It doesn't speak
13 for itself. But then if you follow the rest, "Acthar WAC by
14 month," okay, I know that the WAC is the wholesale acquisition
15 cost. Now we are getting somewhere. I can say to this
16 witness, "If you are looking for the transaction sales between
17 the manufacturer and CuraScript, is this the data?" "Yes."
18 Okay. Let's just go through and understand what it is.

19 But this data dump makes it very difficult, and we
20 have talked about it, and we have tried to say we want the
21 sales by indication, we want discounts, we want rebates
22 because all that factors into the calculation of damages.

23 MS. MCCAFFREY: Right. He is asking a 30(b) --

24 MR. HAVILAND: And we have asked for a witness with
25 knowledge to testify about those issues.

1 MS. MCCAFFREY: Judge --

2 MR. HAVILAND: I can't give you a better flashlight,
3 Judge. These are massive data sets that were produced, as she
4 says, responsive to our requests. Now we want to understand
5 what they mean.

6 THE COURT: And they have a right to understand what
7 they mean, Ms. McCaffrey. They do.

8 MS. MCCAFFREY: I agree. We are trying to do that.
9 Judge, I, 100 percent, agree with you, but their expert
10 certainly had enough information to submit a class
11 certification in July. Their expert presumably -- their
12 expert has sat for -- has been an antitrust expert --

13 THE COURT: It doesn't matter. It doesn't matter.

14 MS. MCCAFFREY: But they have --

15 THE COURT: They have a right to this information.
16 The question becomes how can you prepare your witness --

17 MS. MCCAFFREY: Correct.

18 THE COURT: -- to give them that information.

19 I am going to say that both of you will benefit from
20 further defining these issues, and if not, I will just
21 order -- if you don't sit down and further define these
22 issues, then I'm just going to order that you produce somebody
23 on all these data sets and be prepared to answer only A
24 through F, okay? And see what you get, Mr. Haviland, and I
25 don't think you are going to get what you want.

1 MR. HAVILAND: So, Judge, we had a meet-and-confer,
2 and we spent a long time, and frankly this meet-and-confer
3 process is a broken system because what we get is associates
4 who have no knowledge and no information.

5 THE COURT: Ms. McCaffrey --

6 MR. HAVILAND: And then it goes to Ms. McCaffrey and
7 she writes a letter.

8 THE COURT: -- and Mr. Haviland are going to meet and
9 confer in a conference room --

10 MR. HAVILAND: I welcome that. I welcome that.

11 THE COURT: -- and not by phone.

12 MS. MCCAFFREY: I have been on this meet-and-confer,
13 Your Honor, and Mr. Haviland is getting this a little
14 confused.

15 THE COURT: No, it is just you two in a conference
16 room. I mean, you are here. Why don't you go to the
17 conference room right now and sit down and talk about it
18 because either this gets more specific or somebody sits in a
19 deposition and answers B through F for each one of these data
20 dumps, and neither of you are going to get what you want. So
21 it would just seem to me that that's the way that this should
22 be done.

23 How much time do you think you need, the two of you,
24 to meet and talk this through?

25 MR. HAVILAND: So, Judge, I have done this many times

1 in my career, and I want to be clear what my intention is
2 coming out. We asked topics 1 through 14. These are the
3 issues --

4 THE COURT: I haven't gotten to all those topics yet.

5 MR. HAVILAND: But what I'm saying, Judge, that's the
6 flashlight that I'm looking to have answered when I go into
7 those data sets, okay? I don't know that the series of API,
8 and there is a lot of them, relate to this. I don't know that
9 because it's Acthar data, but we don't know when it says
10 "patient" is it sales data or is it something else. Is it
11 medical? Because if it relates to the patient's medical
12 condition, then we are not interested in it for purposes of
13 this 30(b)(6).

14 MS. MCCAFFREY: Your Honor, this exactly explains
15 what the problem is. Plaintiff hasn't done their own
16 homework. They are not even opening these databases and
17 attempting to understand what --

18 MR. HAVILAND: Judge, we absolutely have, and my
19 expert filed a report --

20 MS. MCCAFFREY: So I am happy --

21 THE REPORTER: Please, one at a time.

22 THE COURT: Stop. One at a time.

23 MR. HAVILAND: My expert filed a report based upon
24 what he believed it was because they didn't want to put it out
25 before the deadline. That was two months before the deadline,

1 Judge.

2 THE COURT: Listen, we are not going to get heated
3 about this because if we are, we will just stop, and I will
4 just enter a ruling in writing, and neither of you will get
5 what you want.

6 MS. MCCAFFREY: Your Honor, we welcome the
7 opportunity to meet and confer. We provided a reasonable
8 proposal back to plaintiff. They sat on that proposal.

9 THE COURT: No, your proposal was not reasonable.

10 MS. MCCAFFREY: Then, Judge --

11 THE COURT: It was not reasonable. It was not. He
12 is entitled to ask what he wants, not what you want to give
13 him.

14 MS. MCCAFFREY: And I'm not suggesting that, Judge,
15 but I am suggesting, and Judge Johnston has been clear, we
16 need more than what is here.

17 THE COURT: Absolutely.

18 MS. MCCAFFREY: And so I'm happy to sit down and meet
19 and confer.

20 THE COURT: Which is what I'm trying to get the
21 parties to do, or I will just strike it, and you can start all
22 over again, Mr. Haviland, because this is not an appropriate
23 30(b)(6).

24 MR. HAVILAND: Judge, I don't know how you could do
25 it any differently. You ask for sales, discounts, rebates as

1 a generic category, and then you point the defendant to their
2 data set. What more can I do without having a data
3 dictionary, which I'm shocked that a company, the largest PBM
4 in America, has no way to understand. If the CEO said, as
5 Your Honor is saying, "What does this mean?", he can't get the
6 answer because they don't maintain any type of data
7 dictionary.

8 You mean to tell me Tim Wentworth can't get the
9 answer to that question? He can't get it because they don't
10 maintain it? I don't believe that, Judge, because I know what
11 they do with the information and how they use it, and we are
12 going to see it in an expert report. I'm going to circle this
13 part of the transcript. We are going to see it in an expert
14 report where some of these data sets are going to be utilized
15 like rebates. They are going to say, "Oh, the net price, you
16 have got to take into account the rebate." Where is the
17 rebate here, Judge? I can't find it.

18 THE COURT: Give me an example of some of the
19 questions you would ask if I allowed this to go forward. You
20 have got your witness. Tell me what you would ask.

21 MR. HAVILAND: Okay. Let's start with where I just
22 left off, the rebate analysis. So there is a document,
23 0814774, rebate change analysis summary with price increases
24 from 2013, okay? 2013.

25 THE COURT: Okay. I'm with you.

1 MR. HAVILAND: I'm taking it at face value.

2 "Mr. Witness, let me first ask you is this a data set
3 that deals with rebates generally?

4 "Yes, up to 2013.

5 "Okay. What about after that? Was there some change
6 at the company? Do you no longer maintain that? Because
7 clearly, there is rebates. How would you go look at it? Is
8 there something else that I'm not seeing here," just so I get
9 a lay of the land, before I even get into the data set,
10 because I have a data set that says it ends in 2013. This
11 case comes all the way through to 2022. So then I will go
12 into the flashlight and start asking about that data set.

13 Now, it is a rebate change analysis. Is it only
14 looking at where the rebate that is either provided by
15 contract or otherwise has been altered, changed? How do I get
16 to see the actual rebate as a static number going back to the
17 time when that payor got it? I'm trying to work through that
18 data set to understand how this company, which processes
19 rebates every day -- they sell to my clients, the class -- the
20 fact that the PBM beats up on drug companies to give rebates.
21 It's their sales pitch.

22 So this is something they know, Judge, because they
23 are constantly telling my clients -- they actually can tell
24 one of my clients how much money they save them on a rebate on
25 an annualized basis. If they can put that in one summary

1 slide, there is data to back it up. And does this data set do
2 that? And I can only do what you do, Judge. I look through
3 here. I don't see rebate. I'm looking, trying to find the
4 word "rebate".

5 Oh, no, here is another one, okay. And then I go to
6 last one, 4838429: ESI, rebate data, 2014_2019.

7 "Sir, is this the data set that picked up from the
8 one we just looked at? Okay. Now, this one, sir, does not
9 say change. So is this the static look of a rebate, looking
10 at what was paid, or is it only looking at alterations?"

11 And then I go back and say: "Well, where is the
12 static data set for 2013 and before?"

13 That's how that deposition would go, Judge. And by
14 the way, that topic, that topic, is over at No. 11, who got
15 the rebates, who paid the rebates, how the rebates were
16 quantified. They are all in the general topic, trying to go
17 to the data set to understand the fact of a rebate and who got
18 it so that it can be quantified for purposes of a report.

19 THE COURT: Okay. So what Mr. Haviland is saying is
20 the topics that he is going to ask with respect to each of the
21 data sets are listed in 1 through 14. Does that help you?

22 MS. MCCAFFREY: Judge, no. I mean, I can try to go
23 back, Judge, and, for example, find which records it applies
24 to, for example, but what Mr. Haviland just described, for
25 example, of adding up and figuring out where all the rebates

1 went, that's expert testimony. That is not appropriate for
2 30(b)(6) testimony.

3 Now, if we are talking about A, so subtopic A, the
4 15, if he is asking in each of these spreadsheets whether I
5 see total dollar volume-sales of Acthar, for example, I can
6 say, "Go to XYZ spreadsheet. You are looking at columns D,
7 EE, X," whatever.

8 I am sure that we can do that. We can provide it in
9 writing. It is what I suggested two months ago. That
10 at least will get somewhat closer, I think, to what he is
11 looking for and what he is describing.

12 If his concern is what our experts are doing with
13 this data, then maybe the best course is to wait until after
14 the expert reports come in. I don't know if -- that's another
15 option to alleviate his concerns that they need to understand
16 the data sets our experts are relying on. I don't know what
17 those sets are at this point. It is certainly some subset of
18 this, if not all of it.

19 But if the question is for A, the record layout or
20 legend for each data set or alternatively some sort of written
21 description of which record layout you go to for the
22 identities of third party payors, the identities of patients,
23 I can get that. I can find that.

24 THE COURT: Would the questions be something along
25 the lines, Mr. Haviland, of "Tell me which of the 53 data sets

1 contain the total dollar volume of sales for Acthar by year,
2 by indication, and by state?"

3 MR. HAVILAND: Your Honor, sometimes you do a better
4 job as an advocate than I. I went right to my example, but
5 that is the headline. I would start with those topics, and
6 "If you were me or you were my expert, where would you go
7 look? And if not these, then which?"

8 THE COURT: All right. So I'm going to allow the
9 deposition to proceed with respect to questioning the witness
10 and selecting a witness and preparing him to address where
11 within those 53 data sets the information in 1 through 14 can
12 be found. I'm also going to allow Mr. Haviland, then, to
13 question the witness on the questions listed in A through F.
14 I don't know -- I will allow him to ask G. I don't know
15 how -- certainly this person would not be required to go and
16 ask how people outside of Express Scripts use it, but to the
17 extent he has knowledge without having to do some sort of
18 independent research, he would have to respond to that.

19 MR. HAVILAND: Judge, just so you know, that is only
20 intended -- sometimes they outsource those functions. We just
21 didn't want it to be -- if there is an accounting firm or
22 someone else that is doing the data crunch, we just want to
23 know because that is potentially a third party subpoena.

24 THE COURT: To the extent, Ms. McCaffrey, that you
25 can get some sort of a dictionary, record layout, or legend

1 for each data set prior to the deposition, within seven days
2 before the date of the deposition, please get him whatever you
3 can in writing to attempt to streamline that.

4 MS. MCCAFFREY: Understood, Your Honor.

5 THE COURT: All right. So that --

6 MR. HAVILAND: Your Honor, just one caveat. I
7 apologize. But, again, we attempted to grab the data sets we
8 are aware of. If there is another, and in the
9 interrogatories, they identify others, I just don't want it to
10 be those 53 because if the witness says, "Well, we have them,
11 Mr. Haviland" --

12 MS. MCCAFFREY: Well, Judge --

13 THE COURT: No, I agree with you, Ms. McCaffrey. I
14 understand the argument. I too said I don't understand what
15 16 and 17 are.

16 MR. HAVILAND: Judge, I can read you the
17 interrogatory.

18 THE COURT: I know, I know, but I haven't ruled on
19 the interrogatories or what needs to be produced, and if you
20 want to wait and not do your 30(b)(6) until all written
21 discovery is done, then we will have a definitive, but I
22 cannot ask her to produce somebody prepared to discuss
23 documents that haven't been produced yet.

24 MR. HAVILAND: That's fine. We will take the
25 deposition.

1 THE COURT: All right. So that's my understanding of
2 how 1 through 14 is going to be dealt with in this 30(b)(6)
3 deposition, is that those requests are going to be aimed at
4 how would I find that information in those data sets.

5 MS. MCCAFFREY: Yes. To be clear, how we are going
6 to find the data, yes.

7 THE COURT: Right, as well as once those are
8 answered, then those follow-up questions that he has listed
9 here.

10 MS. MCCAFFREY: Well, Judge, I will try, but I'm
11 telling you right now that this is not -- that's expert. That
12 is, these are data sets. Experts, what they do is they go in,
13 they pull them out, they run different tables, different
14 analyses. I mean, I'm concerned here that what Mr. Haviland
15 is asking us to do is to provide expert testimony via a
16 30(b)(6).

17 MR. HAVILAND: Judge, they have an expert deadline --

18 THE COURT: Let me stop it. Let me stop it.

19 That's not what he is doing because if he were doing
20 that, he would be having you produce someone to tell you. He
21 would be asking you to produce someone to tell him the amount
22 of money that your client received from Acthar as a result of
23 rebates, the amount of money that your client -- he is not
24 asking that. He is asking -- and I'm not allowing him to ask
25 that.

1 He is asking you to produce someone to tell him where
2 within these data sets would I go if I wanted to find out the
3 amount of money that your client makes from Acthar as a result
4 of inflation protection, and then he can take that information
5 and put it to his own experts to do the analysis.

6 MS. MCCAFFREY: Okay. So just to clarify --

7 THE COURT: Do you see the difference, Mr. Haviland?

8 MR. HAVILAND: I do, Your Honor.

9 THE COURT: I agree with you.

10 You cannot ask her people to do that kind of
11 analysis. You can gather the information, and that's what I'm
12 letting you do.

13 MR. HAVILAND: And, Judge, I only want to know what
14 the companies know. When they hire a high-priced expert to
15 come in and analyze it -- they are going to do that. That is
16 going to come in November.

17 THE COURT: And you are going to do it too. You just
18 want to get the information.

19 MR. HAVILAND: I just want my guy and my people to
20 have the same access that they have.

21 THE COURT: Understood. So that's what we are doing
22 here. So that takes us 16 and 17, I'm not allowing.

23 Express Scripts' divestiture of UBC in 2017,
24 Mr. Haviland provided the specific questions and issues he
25 wants to ask with respect to that topic.

1 Ms. McCaffrey, in Exhibit D, which is his letter, he
2 says specifically what he wants.

3 MS. MCCAFFREY: Right, which actually expanded the
4 topic. So he has now asked for the --

5 THE COURT: I'm going to allow it. I'm going to
6 allow it limited to what he says he wants to question them
7 about in that paragraph.

8 MS. MCCAFFREY: Okay. Nothing more, Your Honor?

9 THE COURT: Nothing more.

10 MS. MCCAFFREY: Because the UBC -- okay, all right,
11 got it.

12 THE COURT: Right, because he has to make it
13 specific.

14 MS. MCCAFFREY: I understand.

15 THE COURT: He made it specific. You now know what
16 to prepare your folks on.

17 MS. MCCAFFREY: Okay.

18 THE COURT: The same thing with respect to the
19 Mallinckrodt Acthar business topics 1 through 5. Mr. Haviland
20 has indicated he wants to know what Express Scripts' entities
21 knew about it, when they knew about it, and what they did with
22 such knowledge. You need to prepare your folks to answer
23 those questions with respect to those five topics, okay?

24 MS. MCCAFFREY: Yes, Your Honor.

25 May I make any argument against that?

1 THE COURT: Go ahead.

2 MS. MCCAFFREY: Okay. No, I just -- the way these
3 topics are drafted, Mallinckrodt's acquisition of Questcor,
4 Mallinckrodt's acquisition of BioVecta, the sale of BioVecta,
5 Mallinckrodt's acquisition of the Synacthen license,
6 Mallinckrodt's return, this is not even directed at Express
7 Scripts. This is directed at Mallinckrodt.

8 THE COURT: No, he wants to know what your clients
9 knew about that.

10 MS. MCCAFFREY: Well, that is not what the --

11 THE COURT: Well, he has clarified that, so that's
12 why I'm saying -- just remember that's what the
13 meet-and-confer is for, right? You meet and confer, and he
14 clarifies.

15 MS. MCCAFFREY: Yes, but the meet-and-confer seems to
16 be that Mr. Haviland continues to get whatever he wants, but I
17 understand. I will happily prepare --

18 MR. HAVILAND: Your Honor, we want to know what the
19 defendant knew.

20 THE COURT: Well, Ms. McCaffrey --

21 MR. HAVILAND: That's it.

22 THE COURT: -- you are not actually arguing to me
23 that it is not relevant what your client knew about these
24 topics?

25 MS. MCCAFFREY: I am not arguing, but I am going to

1 say I don't -- like if he wants testimony that says they
2 didn't know anything until it was public, then that's fine,
3 but we will prepare a witness to testify on those topics, Your
4 Honor.

5 THE COURT: All right. Now, we get to the issue of
6 the bankruptcy, and I am not going to allow this because this
7 is not an appropriate way to structure a -- I mean, you don't
8 ask someone to be prepared to testify as to documents. You
9 have to be specific about what you want to know about those
10 documents, and this is just not appropriate.

11 Ms. McCaffrey has offered to prepare someone to
12 testify on the topics of the negotiation between Mallinckrodt
13 and CuraScript regarding the revised wholesale product
14 purchase agreement and the termination of CuraScript's
15 wholesale purchase agreement. It would seem to me, based on
16 what you told me last time, Mr. Haviland, that those are two
17 topics you are interested in.

18 MR. HAVILAND: They are, Your Honor, but let me just
19 preface this whole bankruptcy, and the way I thought about it
20 this morning was these companies got married in 2007, and they
21 are getting divorced, and a divorce is not so linear. It is
22 not just one event. It is usually a bunch of issues. And
23 what we have seen here and we learned last week for the first
24 time, this company decided, as this marriage was unraveling,
25 to sign a contract with a competitor, ANI Pharma, for the

1 exclusive distribution of that product.

2 Now, Judge, I have asked that question in
3 interrogatories, document requests, and it is yet to be
4 answered, until the end of the deposition. The witness
5 says -- and I have a standard, "Is there anything else you
6 want to tell me?"

7 He says, "Well, yeah, I want to tell you about ANI
8 Pharmaceuticals and the fact we have an exclusive agreement,"
9 at the end of a six-hour deposition. That's not how it is
10 supposed to work, Your Honor. And that's why we want to know,
11 as they were going through this divorce, when did that happen
12 because clearly Mallinckrodt said, at the end, "Enough. We
13 are done with you. We are going somewhere else."

14 THE COURT: Well, you are going to get that if she
15 prepares someone to answer your questions on those topics,
16 okay?

17 MR. HAVILAND: Okay.

18 THE COURT: You will get that, and then we don't have
19 to be going document by document.

20 So you understand, Ms. McCaffrey, that you are going
21 to -- that I'm ordering your proposal is what --

22 MS. MCCAFFREY: Yes, Your Honor, I understand.

23 THE COURT: Okay. That is the extent of the issues
24 with respect to the 30(b)(6).

25 Are we going to have a problem with respect to

1 getting dates for those or chronology for when in the course
2 of the discovery that is going to happen?

3 MS. MCCAFFREY: No, Your Honor.

4 MR. HAVILAND: Judge, I would ask that that happen in
5 the month of August because we are within 90 days. The
6 schedule is filling up a lot. September and October, it
7 always happens, are becoming the default.

8 I wanted to tell you at the beginning here that we
9 have been working very cooperatively with Mr. Shapland on
10 Mallinckrodt's scheduling issues that were the subject of our
11 Friday filing. So I'm only asking, and we can get to this in
12 a moment, because we are populating the schedule with those
13 issues -- this issue has been out here, Judge, since May -- I
14 would like to have it done in August.

15 THE COURT: But I haven't ruled on it until now, and
16 now Ms. McCaffrey knows what she has got to prepare her folks
17 on, and it is not a small task. It is not a small task. So I
18 would like to see that get done --

19 MS. MCCAFFREY: Your Honor --

20 THE COURT: Go ahead.

21 MS. MCCAFFREY: I'm sorry to interrupt. I apologize.
22 I just wanted to flag.

23 Some of this may also be answered by fact witnesses,
24 so that's where I need to go through and look at the
25 depositions because, for example, Nicole Hebbert, who is a UBC

1 employee, may be best positioned to testify as a fact witness
2 and then provide 30(b)(6) testimony on the data. So that's
3 where there is a struggle here. Some of these may be answered
4 by fact witnesses. I will work and we will identify that with
5 the plaintiffs if that is the case, but I just want to flag
6 that right now.

7 THE COURT: Work it out, Mr. Haviland. You are going
8 to get the information.

9 MR. HAVILAND: Judge, I just want a date certain.
10 That's all we want, a date certain.

11 THE COURT: Work it out. I hope I don't have to
12 enter a date certain, but I would expect that it would get
13 done so that we are going to meet that October deadline.

14 All right. Did I hear you say you worked out the
15 issues with Mallinckrodt on the depositions?

16 MR. HAVILAND: Kind of, Judge, and I know
17 Mr. Shapland wants to come up, but let me just -- that's fine.

18 We were talking with Mr. Shapland since the time the
19 stay was lifted about how to deal with the eventual status of
20 Mallinckrodt as a third party, and I will say he is amicable
21 to work with. We filed the motion because we hadn't made
22 progress. I think we crossed paths. He had sent a late
23 Friday email after hours that we didn't see that made
24 proposals in there. He also committed to working
25 cooperatively for dates for a number of witnesses. There is a

1 few. The apex witnesses, he wants to get placeholders, hold
2 that. We had another nice conversation again in the hallway
3 about the two issues in our motion.

4 Documents, I understand he is sending a whole volume
5 to our vendor. We agreed to look at and next week meet and
6 confer again about whether we want supplementation to the
7 present, and, if so, what will that be. We are going to
8 discuss, hopefully, narrow tranches of that. Mr. Shapland has
9 reserved rights on that issue. But as to depositions, I think
10 we are going to get there. He has committed to telling us who
11 his firm is representing and who it is not. We have got
12 some third party practice to engage in.

13 But I would ask that the motion be adjourned. I know
14 counsel would like it taken down, but our concern is making
15 sure that if we have this agreement, we can come back because
16 we are inside of 90 days, and we are going to need the ability
17 to get to the Court.

18 THE COURT: I would ask that you withdraw it with
19 leave to refile it, and I have already read it, so it is not
20 like you couldn't refile it and couldn't notice it up within
21 five days.

22 MR. HAVILAND: We will do that, Judge.

23 THE COURT: But I will say that there are a whole
24 host of depositions here that need to get done, and so I would
25 like to see the schedule in place and start ticking those off

1 as soon as possible.

2 MR. SHAPLAND: Yes, Your Honor. We fully understand
3 that. Our goal is to get these depositions done by the
4 discovery cutoff.

5 THE COURT: All right.

6 MR. SHAPLAND: There is no dispute about that.

7 Mr. Haviland had informed the Court that we had not
8 provided dates for witnesses at a time when he hadn't even
9 told us who he wanted to depose. The second we got that
10 information, we have been working as quickly as we can to get
11 those done. I think we have established whether we represent
12 or won't represent all of the folks on his list except for one
13 who we haven't heard from. We will finish that up. We have
14 proposed dates as to about half of those whom we represent,
15 and we are working on dates for the rest.

16 I anticipate potentially having a dispute over two
17 issues that were raised in the motion to compel, and I would
18 like to preview those for the Court now.

19 THE COURT: Okay.

20 MR. SHAPLAND: One of which probably relates to a
21 motion that is going to be argued next, and so maybe I will
22 hold those comments.

23 But with respect to the witnesses, Mr. Haviland has
24 proposed deposing five people who were deposed in the
25 bankruptcy. He had notice and an opportunity to participate

1 in those. He only participated in one. He did so for limited
2 purposes. The depositions were open for deposition on these
3 claims. He chose not to participate in those depositions and
4 ask questions related to the Acthar claims.

5 What we are asking, in light of that, is simply that
6 he review the transcripts, and then he can come to us with a
7 set of topics that he would either like to re-cover or that
8 weren't covered that he believes need to be covered and a
9 proposal on how long those depositions should be in light of
10 the fact that these people have already been deposed on these
11 issues.

12 Now, that's our ask to Mr. Haviland. He is
13 considering it, I believe. I have provided some further
14 nuance on this point in that three of these people are now
15 former employees. They don't necessarily have the same
16 interests that I have and that the company has, Mallinckrodt,
17 in cooperating at the level we are. They may be resistant.
18 These three formers may be a little less eager to just simply
19 submit themselves to a wide-open deposition without this
20 process, and I believe that this process that I'm asking for
21 will help us communicate with these people who are going to be
22 our clients, who are our clients, with respect to why it is a
23 good thing to cooperate.

24 So that's what we are asking for on the witnesses,
25 and if all we wind up with is, "No, I'm going to depose them

1 on whatever I want and for however long I want," we may be
2 back here in short order with some kind of dispute depending
3 on how particularly these three formers feel about that,
4 right?

5 THE COURT: Well, I'm not so concerned about how they
6 feel about it because whatever my ruling is, a subpoena is
7 going to be issued, and they are going to have to come in and
8 tell me how they feel about it.

9 MR. SHAPLAND: I agree. That's what I'm saying. We
10 might be here with me telling you how they feel about it,
11 whereas if we get engagement on this process, talking about
12 what it is that these depositions are supposed to cover that
13 wasn't covered in prior depositions during the bankruptcy on
14 these topics, then I think it might be --

15 THE COURT: I think it is worth working out. It
16 sounds to me like you have got a good chance of working it
17 out. I'm not going to tell you how I would rule on either of
18 these motions because I might not have to make that decision.
19 So work it out, but you are going to have to work it out
20 quickly, and if you can't come to a resolution, bring it back
21 to me. I will rule quickly because I want these deps done.

22 MR. HAVILAND: Judge, let me just respond briefly
23 on --

24 THE COURT: No, there is nothing to respond to.

25 MR. HAVILAND: Well, I just want to be clear, Judge,

1 the depositions weren't taken in this case.

2 THE COURT: I understand. They were taken in the
3 bankruptcy case.

4 MR. HAVILAND: They were taken by parties that were
5 not adverse. My client's claims weren't objected to.

6 THE COURT: I haven't read the depositions. I don't
7 know anything about what the parameters were.

8 MR. HAVILAND: They are truly depositions in another
9 matter --

10 THE COURT: Right.

11 MR. HAVILAND: -- and the issues in this case were
12 not part of the examination.

13 THE COURT: So work it out.

14 MR. HAVILAND: So I committed to Mr. Shapland to
15 review them and see, and we have done this hundreds of times.

16 THE COURT: Well, it is to your advantage. You have
17 got a hundred --

18 MR. HAVILAND: It will streamline, absolutely.

19 THE COURT: -- depositions.

20 MR. HAVILAND: I have committed to that and then to
21 try to work to streamline the examination using prior
22 testimony.

23 THE COURT: Sounds good.

24 MR. SHAPLAND: Your Honor, with respect to the
25 depositions, I'm anxious to provide him the transcripts. I

1 have just been waiting for an agreement that the
2 confidentiality designations made in the bankruptcy will be
3 effective with regard to similar protections that are afforded
4 under the protective order in this case.

5 MR. HAVILAND: Just with the proviso, Judge, that
6 they are not depositions in this case. To confidentiality,
7 absolutely, we have no problem with keeping the confidence of
8 the company.

9 So Express Scripts did a number of examinations, real
10 quick ones, and so that was not part of an adversarial
11 process, and we don't want that coming in here --

12 THE COURT: Right. There might be all you need to
13 know was already asked, and you can check those folks off. If
14 you read them over, and there is five more things you need to
15 know, boom, that's good too. So it is just good practice.

16 MR. HAVILAND: And I'm just confident we are going to
17 be able to work this out with Mr. Shapland.

18 MR. SHAPLAND: Yes.

19 So do I have an agreement from Mr. Haviland that the
20 confidentiality designations made in the bankruptcy with
21 respect to these transcripts --

22 THE COURT: I think he just said that, right?

23 MR. HAVILAND: That's right.

24 THE COURT: Good. Okay.

25 MR. SHAPLAND: So the other topic is documents, and I

1 will just put a pin in that because I believe my issue
2 overlaps with the debate we are going to have with respect to
3 how far do we have to come to the present with respect to
4 document productions.

5 THE COURT: And I do think your issue is different
6 than Express Scripts' issue somewhat, but you guys can try to
7 work it out. I mean, you had told me before when you were
8 still in the case that you were willing to turn over the
9 documents and there were a bunch of bankruptcy documents. It
10 sounded to me like you were willing to turn it all over.

11 MR. SHAPLAND: Yes, yes, we are, and we have done
12 almost all of that to this point. We are winding up another
13 production.

14 THE COURT: All right. All right.

15 MR. SHAPLAND: That takes us all the way up to
16 September of 2021. So the question is, and my concern is,
17 whether we have an additional obligation to produce documents
18 from that point all the way up to May of 2022.

19 THE COURT: All right.

20 MR. SHAPLAND: Now, with respect to that, all we have
21 from Mr. Haviland is a blanket "Update your entire production
22 all the way to May of 2022."

23 My view would be, first, that documents that are
24 dated so far to the present aren't relevant. This is about a
25 conspiracy that supposedly occurred in 2007, and so much has

1 happened since then. If you presume, if you permit that that
2 allegation of conspiracy is plausible at that point in time,
3 so much has happened since then, points along the way where
4 that conspiracy is clearly over such that documents that are
5 about the divorce, so to say, with respect to the exclusive
6 distribution agreement have nothing to do with this case
7 because it wasn't just the exclusive distribution agreement
8 that got Mr. Haviland past the pleading hurdle in this case,
9 it was coupled, supposedly, with some allegation of a
10 conspiracy between Questcor executives in 2007 and ESI to
11 inflate the price of Acthar.

12 Since that time, Questcor was sold, entirely new
13 ownership, new management. Since that time, Mallinckrodt
14 divested its rights to Synacthen; ESI changed its prior
15 authorization policies with respect to Acthar; Mallinckrodt
16 went into bankruptcy, and, again, has entirely new ownership.
17 So much has happened since that supposed 2007 conspiracy that
18 documents in this last little tranche from October 2021 to the
19 present simply aren't necessary for Mr. Haviland to prove his
20 claims.

21 MR. HAVILAND: Judge, we had a really nice
22 conversation in the hallway, but I think we forgot about it,
23 and that was simply that I was willing to look at the
24 documents being turned over, and on much I agree, that the
25 Questcor situation was well-discovered. Questcor actually

1 wasn't sold. I know Mr. Shapland misspoke. It was merged
2 into Mallinckrodt. It is the same entity. It was actually
3 called Questcor for a time.

4 MR. SHAPLAND: New ownership.

5 MR. HAVILAND: But what so much has happened is the
6 divorce, and I believe we are at the point of September of
7 '21, that was clarified for us, and we probably have this
8 tranche.

9 THE COURT: What was September of '21?

10 MR. HAVILAND: That's when they stopped producing
11 documents.

12 THE COURT: Oh, that's right.

13 MR. SHAPLAND: The bankruptcy productions kind of
14 take us up to that point in time.

15 THE COURT: Okay.

16 MR. HAVILAND: And, Judge, what is important about
17 that is at that point, these parties were both arguing to
18 Judge Dorsey, "We want you to approve this new contract,"
19 which is attached to their pleading, and the judge didn't do
20 that. He didn't make findings. So how we got from that point
21 to the point where Mallinckrodt decides "We are done with
22 CuraScript," that's what I raised with Mr. Shapland, that's
23 what we are going to raise in our corporate designee, and
24 that -- I don't know who the custodians are. I can't imagine
25 that involves a whole lot of people.

1 THE COURT: Well, that's the point that we are going
2 to discuss with Express Scripts, which is I understand that
3 you have a specific set of issues you want updates on, which
4 could well tailor your additional searches from rerun every
5 search term to every custodian to look for these things on
6 these topics.

7 MR. HAVILAND: Yes.

8 THE COURT: And I think Mr. Haviland understands that
9 that's the way I'm looking to go. I told him that the last
10 time we argued this issue. So it would be in both parties'
11 best interest to focus on what are the topics you think
12 occurred, and you have already told me what they are, between
13 2021 and 2022 and see what documents you have on those things.

14 MR. SHAPLAND: Yes, Your Honor. I stated my position
15 that I don't think those documents are relevant, but I'm not
16 here to -- our intent is not to stand on principle. What we
17 need from Mr. Haviland is a refined request. Right now the
18 only thing we have is "Update your entire production."

19 THE COURT: Right, right.

20 MR. SHAPLAND: And if we get something specific,
21 something that is practical, rather than fight it out, we'll
22 just implement the request and move on with our lives. That
23 would be our preference. We don't have that yet. I'm here
24 just to tell you that with respect to this motion that you
25 read and he filed, that's one concern I have, and potentially

1 we could be back here.

2 THE COURT: It's a concern I have too.

3 MR. SHAPLAND: Yes, yes. Thank you.

4 MR. HAVILAND: We committed to next week, Judge. If
5 we have the documents, and I believe we do, we need some time
6 to digest it, and then we will come back with a proposal to
7 Mr. Shapland.

8 THE COURT: All right. Sounds good.

9 MR. SHAPLAND: All right. Thank you, Your Honor.

10 THE COURT: Thank you.

11 Okay. The last one, I think, and that is this issue
12 of the updating the documents.

13 So I don't know if what you want is what you say you
14 want, Mr. Haviland.

15 MR. HAVILAND: So, Judge, their reply --

16 THE COURT: If what you say you want -- I don't
17 understand. You didn't do what I asked you to do. I
18 understand you limited it. Let me just -- like I said, I
19 don't want to -- I have taken so much briefing on this. I
20 don't want it argued from the beginning. I know the issue
21 intimately here, okay?

22 When you asked before to have the defendants rerun
23 all their searches for all the search terms against all the
24 custodians from 2019 to the present, I said that's too broad
25 given the burden, the expense, the proportionality, and the

1 lack of relevance, and I said figure out what you think has
2 happened between 2019 to the present that would be relevant to
3 your case, and you told me three topics. You listed them for
4 me. I went over them again yesterday. I went over them again
5 today about the three topics you think would be relevant,
6 okay?

7 So now I'm scratching my head. Were those three
8 topics even in the search terms that you originally proposed?
9 So how would even rerunning --

10 MR. HAVILAND: Judge, let me just explain to you --

11 THE COURT: -- those search terms even give you that?

12 MR. HAVILAND: -- the problem of a request for
13 production, and we have the fifth request which goes through
14 these issues ad nauseum, and I can walk through that. It
15 wasn't responded to.

16 THE COURT: I have seen it. I have seen that.

17 MR. HAVILAND: And that's part of our motion because
18 Your Honor said, "Why didn't you move on that?"

19 THE COURT: I know.

20 MR. HAVILAND: But let me just address your question.

21 As to the first, second, third, fourth, Express
22 Scripts didn't go and look in each custodial file for the
23 contract documents as to this. They ran search terms. They
24 took the entire universe and created search terms. So they
25 are now --

1 THE COURT: And just they turned over everything?
2 They had to crossmatch what they got to what you asked for.

3 MR. HAVILAND: So, Judge, up to April of 2017, I
4 believe so, but as the record shows, as the record shows,
5 Mallinckrodt and Express Scripts decided that the cutoff would
6 be the complaint.

7 Now, we learn through the briefing, and we learned it
8 only through the briefing, that because Judge Tolliver in a
9 case involving a breach of contract in Philadelphia ordered
10 them to produce documents in July of 2019, they decided to
11 update as to some but not all because not all the custodians
12 in that case are relevant to this case. In fact, there are
13 some that aren't. Michael Aschi, Monica Holmes, Paul Grew
14 have nothing to do with the issues here. They are the account
15 reps for the client there.

16 So in response to a court order, they went from April
17 of 2017 to April of 2019. Your Honor queried back in June, "I
18 don't know if they have done that to everybody," and I still
19 don't know that.

20 So what we are asking is that they do the job that
21 they keep saying that they did, that they ran these search
22 terms as to these custodians.

23 Now, let me stop.

24 MS. MCCAFFREY: May I respond to that?

25 MR. HAVILAND: Your Honor, I will simplify this.

1 THE COURT: I want to get your response because I
2 have a lot of issues here.

3 MR. HAVILAND: I will simplify this. There were 60
4 custodians.

5 THE COURT: I know, and you have limited it down to
6 12. I have got that.

7 MR. HAVILAND: Right, of 20.

8 THE COURT: You want them to run all the search terms
9 against the 12 custodians who are going to be deposed.

10 MR. HAVILAND: Judge, I don't even know --

11 THE COURT: Doesn't that -- let me stop.

12 Doesn't that --

13 MR. HAVILAND: But I don't even know that the
14 contract search terms need to be run.

15 THE COURT: Well, that's what I asked you to do.

16 MR. HAVILAND: But, Judge, this is the problem. I
17 get on a phone call with an associate who has no authority to
18 talk, and then I get a letter that makes a proposal. This is
19 what happened. They went from seven, to three, to none. They
20 didn't say, "Oh, Your Honor, yes, I want to try to moot this
21 issue." They went from seven, to three, to none.

22 Now they say to you in their papers, "Shut it down,
23 end the discovery, end it," despite the fact we have until
24 October.

25 THE COURT: We are not going to end discovery.

1 MR. HAVILAND: But that's where we went, Judge,
2 seven, to three, to none. I countered at 12.

3 THE COURT: Twelve? Twelve what?

4 MR. HAVILAND: Twelve custodians who are being
5 deposed.

6 THE COURT: There is 12 custodians being deposed. My
7 understanding, and I thought Ms. McCaffrey had a good
8 proposal, was to take those three topic areas that you had
9 told me about, and she proposed -- you may not -- you may
10 think there is some additional terms, but she said Acthar;
11 ACTH; Mallinckrodt, the two spellings; Synacthen; Novartis
12 within ten of license; Retrophin; ANI Pharmaceuticals; ANI
13 Pharma; and wholesale product purchase and agreement or
14 contract. So it would seem to me that those search terms
15 would get at those three topic areas that you are concerned
16 about.

17 MR. HAVILAND: They wouldn't, Judge, because what she
18 took out was, and I have my -- it's an email from defense
19 counsel. It is Exhibit M to my declaration, which lays out
20 the 60 custodians and all the search terms, and what counsel
21 did was remove corticotropin, adrenocorticotrophic,
22 melanocortin, all the generic names which would have gotten us
23 how this company looks at the market, the product market, are
24 they looking at generic competitors, and that underlies this
25 entire case. When I spoke to you about ANI, it was an

1 example, and ironically when I said "ANI," no one for the
2 defense stood up and said, "Judge, we really want you to know
3 we have a contract with them as of 2021."

4 THE COURT: Will your search terms, the original
5 search terms that have been searched for, the -- was it 60 or
6 whatever?

7 MS. MCCAFFREY: There are 117 search terms.

8 MR. HAVILAND: Your Honor, I will simplify it. 1
9 through 52 relate to contracts, not the contract.

10 If counsel actually got on the phone call and wanted
11 to walk through and have a conversation, this is what I would
12 have said: "1 to 52, you don't have to run, but everything
13 else after, with the exception of the folks that are no longer
14 around." Steve Cartt was with Questcor, out. Moosehead,
15 zodiac, out.

16 But the ones we want, Judge, are the ones about the
17 drugs. Eighty-three to 91 cover the market, okay?

18 THE COURT: Eighty-three through 91?

19 MR. HAVILAND: Yes.

20 And the pricing terms, 100 through 102, 117. All
21 these other -- I'm sorry -- we have the witnesses too. We
22 have Mr. O'Neill, 114. The other people are gone from the
23 company, Judge.

24 MS. MCCAFFREY: Judge, this is the problem. This is
25 the first time we are hearing this.

1 MR. HAVILAND: No, this is not the problem because,
2 Judge, Ms. McCaffrey doesn't get on the calls. She doesn't
3 get on the calls.

4 THE COURT: Mr. Haviland, I'm not going to --

5 MR. HAVILAND: Judge, I just -- I don't --

6 THE COURT: I'm just not. I mean, we are trying to
7 resolve these issues. There is no reason to lose your temper.
8 I mean, there just really isn't.

9 MR. HAVILAND: It is very frustrating, Judge.

10 THE COURT: Well, I have been very frustrated too.

11 MR. HAVILAND: Your Honor, I remember something you
12 told us a long time ago. "Mr. Haviland, when I practiced, I
13 put it in writing." And you have seen that. And the
14 interrogatories, I took the time -- I manage a law
15 firm -- myself, Judge, and went through every interrogatory to
16 tell them their issues. Did I get a response back? Two
17 paragraphs: "We will think about it." But that was my
18 meet-and-confer, Judge.

19 Instead of getting on the phone call with associates
20 who have no authority to say anything, other than "We will
21 take it back," I took the time, as Your Honor suggested, to
22 put it in a letter, and you just saw what we did on the
23 corporate designee. We did it with interrogatories, and we
24 have done it with the documents. But we cannot get there
25 because the fifth request, they say, "Forget it."

1 MS. MCCAFFREY: Judge --

2 THE COURT: Right now I want to talk about updating
3 the searches through the present.

4 Your ask to me, Mr. Haviland, was to run all of the
5 search terms across 12 custodians who will be deposed, and,
6 Ms. McCaffrey, that list is in his motion.

7 MS. MCCAFFREY: But that's not an -- this is the
8 problem. This isn't accurate. Mr. Seiz is not a custodian.
9 They dropped asking for him as a custodian in July of 2020.
10 There is another, Brian Vanderpool, they moved to compel him
11 as a custodian. That motion to compel was denied in 2020.

12 So this isn't limiting, and I don't even
13 know -- there are custodians on here who we have not agreed to
14 on deposition dates. This is an incomplete list --

15 THE COURT: Well, these are --

16 MS. MCCAFFREY: -- of the custodians being deposed.

17 THE COURT: These are the folks he wants.

18 MS. MCCAFFREY: But am I being asked to add
19 custodians right now, Judge, that were already denied on
20 reasonable grounds, on a case that occurred in 2007?

21 THE COURT: Okay. I --

22 MR. HAVILAND: So, Judge --

23 THE COURT: Nope, nope, nope. I'm talking.

24 He wanted you to run all the search terms against 60
25 custodians -- just let me finish -- I said no. He came back,

1 and now he is saying he wants you to run, I guess he is
2 saying, all the search terms against these 12 custodians,
3 okay? I understand what you are saying.

4 I think Mr. Haviland is saying he really doesn't want
5 all the search terms run, that that should have been whittled
6 down, which is what I asked to be done, and it wasn't.

7 So what I'm going to ask that the two of you do,
8 while I take a break, is go into one of the conference rooms
9 and come up with, out of the 60 terms, which of the terms -- I
10 think Mr. Haviland is saying he is willing to whittle that
11 down.

12 If those search terms are whittled down to only the
13 terms that would be relevant to the case and aren't, as we
14 talked about before, something that would not have occurred
15 after 2017 because the issue was over with, why would it be
16 onerous to run those terms against these specific, if I
17 limited it to just these 12, no more?

18 MS. MCCAFFREY: Well, first of all, these are two new
19 custodians. I don't have custodial documents for two new
20 custodians. They are not relevant to this case. They were
21 already denied or dropped. They have already conceded that.

22 THE COURT: Who are they?

23 MS. MCCAFFREY: Seiz and Vanderpool.

24 But also, Judge, this is -- I apologize at my
25 frustration, but I find this frustrating because this motion

1 to compel was a copy-and-paste of what they came into court
2 two months ago and asked for, and they are asking for the same
3 thing and ostensibly limiting it to custodians who are
4 deponents, and maybe now he is saying he only wants these 12,
5 but the 12 aren't limiting because now I'm getting asked to
6 add two additional deponents in here as well and getting asked
7 to run search terms and produce in response to all of these
8 RFPs, which he even has previously conceded are not relevant
9 to whatever happened after 2019, and there is a discovery
10 cutoff date that is reasonable and appropriate, and we have
11 provided a reasonable and proportionate option in terms of
12 supplementing of additional discovery from 2019 through April
13 of 2022. Those are the same categories that he has talked
14 about. The search terms that we are proposing will capture
15 the categories of information that he has identified as well
16 as the custodians, the proposed custodians, that we run
17 against.

18 Right now, if I'm being asked to run, ostensibly,
19 60-plus search terms against at least ten custodians, I don't
20 know what that burden is. Based on past practice, it is going
21 to be significant. It's a lot. And I cannot represent to the
22 Court right now what that is because I haven't gone and
23 collected these documents because we haven't been required to.
24 We have been clear that we cut it off in 2019. We have
25 produced hundreds of thousands of documents that postdate this

1 complaint and go through 2019 on all the custodians who were
2 at Express Scripts up through 2019.

3 So I will work on this, but, Judge, this is -- if
4 past practice is any indication, these are broad search terms,
5 and we were agreeing to run those terms to try to close out
6 discovery, and my concern is that even if we limit it to ten,
7 we are still looking at a significant burden that is, in the
8 proportionality, just not fair here, particularly when we are
9 talking about three -- he has only ever identified three
10 discrete categories, and we have agreed to supplement on those
11 three discrete categories.

12 MR. HAVILAND: Your Honor, I would ask for two
13 things: One, an affidavit, as you have required of Rockford,
14 that says what counsel says at the podium, that they have done
15 what they say they have done as to all the custodians and
16 search terms, so we are not debating this anymore, because,
17 Your Honor --

18 MS. MCCAFFREY: Mr. Haviland has not ever
19 demonstrated that we have failed to meet our discovery
20 obligations.

21 MR. HAVILAND: Your Honor, when I go into the data
22 set --

23 MS. MCCAFFREY: An affidavit is not appropriate.

24 MR. HAVILAND: -- when I go into the data set, we see
25 huge gaps. Mr. Osborne, a deponent, we see no documents

1 before 2012, Judge.

2 MS. MCCAFFREY: He has used those in depositions.

3 MR. HAVILAND: From Mallinckrodt.

4 THE COURT: So I want to hear the proposal.

5 MR. HAVILAND: From Mallinckrodt.

6 What I want is an affidavit, similar to Rockford --

7 THE COURT: Saying that they have run all the search
8 terms against all the custodians through April of 2019?

9 MR. HAVILAND: Against all the custodians, and they
10 have produced as responsive to those terms or put them on a
11 privilege log.

12 THE COURT: Or what?

13 MR. HAVILAND: Or put them on a privilege log if they
14 are privileged and they claim privilege. But to know that the
15 production is completed as counsel has --

16 THE COURT: Through April of 2019?

17 MR. HAVILAND: Right, as to all of them, and then the
18 issue is coming forward.

19 THE COURT: Okay. That's what we have been talking
20 about.

21 MR. HAVILAND: As to that, we have been talking past
22 each other because we don't even know that we have what they
23 say up until April of 2019.

24 THE COURT: I believe that you have that, and I'm
25 going to have her provide an affidavit.

1 MR. HAVILAND: Perfect.

2 MS. MCCAFFREY: Your Honor, I have to say I'm happy
3 to provide that affidavit, but plaintiff has not demonstrated
4 that we have in any way, shape, or form not met our discovery
5 obligations in this case through April of 2019. Even what he
6 just said right now is wrong. He has used countless documents
7 dated between 2007 and 2019 in depositions in this case.

8 MR. HAVILAND: From Mallinckrodt, Judge, from
9 Mallinckrodt.

10 MS. MCCAFFREY: So Mr. Haviland needs to know what's
11 in their own production, and his failure to do that should not
12 fall back on my client.

13 So we will make this declaration, Judge. This is the
14 first time this has ever been raised. It was raised in a
15 reply that was not even authorized and was the only time
16 counsel ever raised anything substantive in terms of a
17 response on this motion to compel.

18 THE COURT: I agree. I'm frustrated with
19 Mr. Haviland.

20 MR. HAVILAND: We should have an affidavit, Judge.
21 Let's just have an affidavit.

22 THE COURT: It would seem to me, Ms. McCaffrey, that
23 this is an easy out, right?

24 MS. MCCAFFREY: It is, Judge, but I have got to tell
25 you I'm sick of getting accused of something that is

1 completely untrue.

2 THE COURT: I'm not accusing you of anything. I
3 believe you when you tell me that, when you tell me you have
4 produced everything through 2019, and that is why I am
5 questioning Mr. Haviland on why he wants all the additional
6 things he is saying.

7 So if the affidavit satisfies Mr. Haviland that you
8 produced everything through 2019, and we are going to limit
9 anything in the future to something very discrete, it would
10 seem to me it's a win for you, right?

11 MS. MCCAFFREY: I would be happy to get this closed
12 out, Judge. I agree 100 percent.

13 THE COURT: Okay. All right. So affidavit --

14 MR. HAVILAND: Judge, my proposal, and I can give it
15 to you right now -- I'm sorry -- the affidavit, yes.

16 THE COURT: You should have given us this proposal a
17 long time ago, Mr. Haviland. It is very frustrating for me.
18 Look at this. Look at what you are asking me to do. And we
19 haven't even gotten to the interrogatories, which, you know,
20 I'm going to try to bite my tongue.

21 But what's your proposal?

22 MR. HAVILAND: That they run No. 11 without "and
23 agree or contract." It should be the "wholesale product
24 purchase," which is the name of the agreement in this case,
25 and the witness, who is the president of the company, said it

1 is the only one, No. 11.

2 MS. MCCAFFREY: We have already proposed that.

3 THE COURT: No. 11?

4 MR. MCCAFFREY: I don't know. He is going through
5 search terms. I assume he is going through search terms.

6 MR. HAVILAND: I will read them into the record:
7 "Wholesale product purchase," in quotes, that's it. It is
8 Exhibit M --

9 THE COURT: So you want them to run "wholesale
10 product purchase" --

11 MR. HAVILAND: Against those 12 custodians.

12 THE COURT: -- against the 12 custodians?

13 MS. MCCAFFREY: There aren't 12 custodians, Judge.

14 MR. HAVILAND: We will get to that in a moment.

15 MS. MCCAFFREY: Am I asking to add two custodians?

16 THE COURT: That's all you want them to do?

17 MR. HAVILAND: No, I'm going to give you the list,
18 Judge.

19 THE COURT: Oh, I thought that was it.

20 MR. HAVILAND: I'm sorry. I have the finite list.
21 While we are speaking, instead of going into the conference
22 room, I can do it right here.

23 Nos. 53 through 63, which are the variations of
24 Acthar, Mallinckrodt, and Questcor.

25 THE COURT: Okay.

1 MR. HAVILAND: Nos. 76 and 77, which deal with
2 pricing.

3 Nos. 83 to 91, which relate to my client and the
4 various drugs that compete with Acthar.

5 And then finally on the last page, again Exhibit M,
6 100 through 102, which, again, are variations of pricing.

7 Now, I would ask that 102 not be limited to just
8 Daraprim and Imprimis, and here is why: I want Imprimis run
9 separately because Imprimis reached out -- this is all in our
10 expert report and our class cert papers, Judge, and I want to
11 say only because they produced documents in April of '22 that
12 Your Honor ordered two years ago. Imprimis offered to do to
13 Acthar what they did to Daraprim. So I would like Daraprim
14 and Imprimis as separate terms.

15 And finally, two witnesses, Mark Trudeau and Hugh
16 O'Neill, but variations of those so that we are not just
17 limited to Hugh O'Neill. We would ask that their email
18 addresses be run, and we are happy to supply those.

19 And the last one is 117, orphan drug strategy, and
20 that's it.

21 We have taken out -- of 117, I have got maybe 20 that
22 get to the issues from 2019 to the divorce.

23 MS. MCCAFFREY: That's about 35 search terms, Judge.

24 MR. HAVILAND: Judge --

25 MS. MCCAFFREY: I have the -- this would have been

1 helpful to have had before. I will take a look at this. I
2 don't know what the burden is and what this is going to
3 return. I do not think that these are getting at what is
4 actually relevant that occurred post-2019, but I understand,
5 Your Honor. I will take this back. I will see what we can
6 do.

7 I will add, if the request is to add two custodians,
8 this motion to compel provides no basis to add them as
9 custodians. They should not be added as custodians, and that
10 will significantly increase the burden.

11 THE COURT: Why are the -- tell me again. One is
12 Brian Seiz, and who is the other one?

13 MS. MCCAFFREY: Brian Seiz and Brian Vanderpool, so
14 two Brians.

15 MR. HAVILAND: Well, Judge, the latter one, you will
16 recall, we did have a hearing on, and Your Honor denied
17 without prejudice.

18 THE COURT: I think I said no.

19 MR. HAVILAND: Yes. We now know more about him
20 because of the late production that we got. Mr. Seiz
21 succeeded Mr. Wentworth as the president and became the head
22 of Accredo. He wasn't a known quantity to us when we were
23 negotiating this. But, Judge, I go back to the original
24 disclosure of 14 custodians.

25 MS. MCCAFFREY: Judge --

1 MR. HAVILAND: Excuse me.

2 They were not on there. Seiz we noticed in 2019,
3 September 2019, duces tecum. There was no objection. They
4 have taken the position that they don't have to produce
5 documents for somebody duces tecum. But just before they went
6 into bankruptcy, we noticed his deposition duces tecum and
7 asked that he be one of our deponents. We are only asking for
8 20 deponents, Judge, 20.

9 THE COURT: Ms. McCaffrey, help me understand.

10 MS. MCCAFFREY: Yes.

11 THE COURT: So if these two folks -- and I just want
12 to talk about the burden, not the relevance.

13 MS. MCCAFFREY: I understand.

14 THE COURT: If these two folks were not identified
15 originally, but now you are being asked to run these limited
16 search terms from April 19th to the present, how is that -- I
17 mean, how is running it against new custodians any more
18 burdensome than, say, somebody who has already been
19 identified?

20 MS. MCCAFFREY: I just don't know, and personally, I
21 think it is burdensome to be adding yet another two additional
22 custodians that they have already walked from, but I can't
23 give you numbers around that, Judge.

24 So I will work with my client to see what we can do,
25 but I certainly think to the extent, which is what

1 Mr. Haviland asked for before, that he is asking that we run
2 the full set of search terms and produce all of the files
3 going back to whenever --

4 THE COURT: No.

5 MS. MCCAFFREY: -- on these custodians --

6 THE COURT: I don't think that is what he is asking.
7 That's not what he is getting. He is getting April 2019 to
8 the present, these search terms that he just read into the
9 record for these 12 custodians.

10 MS. MCCAFFREY: Here is the only other struggle that
11 I have, Judge. What his proposed order requests is that all
12 of these documents be produced five days in advance of
13 deposition. I don't know if we can do that because plaintiff
14 sat on this for so long. So I'm struggling with
15 how -- because we are committing to meeting the deadlines in
16 this case. The parties committed to do that back in 2017 in
17 the ESI protocol. So I will work with my client and see what
18 we can do, but we have got these depositions going in four to
19 six weeks. This is an extremely tight turnaround that my
20 client is having to bear the burden of to do an expedited
21 collection and review because of plaintiff's delay on this.

22 MR. HAVILAND: Judge, these folks were noticed in
23 2019.

24 THE COURT: Mr. Haviland, it is not your turn to
25 talk.

1 MS. MCCAFFREY: I will also say that to the extent I
2 need to respond to the 2019 notice, those actually were
3 quashed by the Court in 2020 because plaintiffs noticed well
4 over 50 depositions of which this was a set. So that is an
5 issue for another day, Judge, but that's not my concern, and I
6 don't want this deposition schedule to get off.

7 So we will do what we can. I don't know that I can
8 make it happen five days in advance of deposition, and I don't
9 think that is a fair burden for my client to have to do,
10 particularly given the marginal relevance of documents between
11 2019 and 2022 on a case that is about a 2007 alleged
12 conspiracy.

13 THE COURT: Well, it is about a conspiracy that
14 continued, Ms. McCaffrey, so I don't agree that nothing that
15 happened after the complaint is not relevant. It is a
16 continuing violation is what they are alleging, anyway, and
17 there may well be things that people talked about or
18 corresponded about after 2007 or 2017 that are relevant to
19 something that happened in the past. So I'm not willing to
20 say that nothing is relevant.

21 I think we have made some significant progress here
22 because what he was asking for is way overbroad, and we have
23 limited it now from 60 custodians to ten current custodians
24 and two new custodians. I don't know how burdensome or how
25 time consuming this is going to be, but it is certainly well

1 less than it originally was.

2 So if you come back to me after you talk to your IT
3 folks and you say, "This is going to take me six weeks to do,"
4 well, then, I don't know, then do I move the discovery
5 deadlines back? I don't want to do that.

6 MS. MCCAFFREY: No, Judge, that should not happen,
7 and I will tell you why it shouldn't happen. We made them a
8 proposal on this back in June. They sat on that for six
9 weeks, Judge. So any delay here lays at plaintiff's feet.
10 None of these deadlines need to be kicked, let alone the
11 depositions. They have the relevant documents.

12 We will do what we can to meet and to try to get
13 productions in, but this delay, if there is any delay, should
14 not rest at Express Scripts' feet. Moreover, Express Scripts
15 should not be prejudiced by further kicking out these
16 deadlines at this point. It is time to get to the merits.

17 THE COURT: I tend to agree with you, Ms. McCaffrey.

18 MR. HAVILAND: Judge, the electronic discovery
19 protocol requires them, when they say "burden," and counsel
20 has repeatedly said -- they say it is burden. They have yet
21 to run any term against any custodian to quantify that.

22 THE COURT: Well, I think that there is a certain
23 amount of burden that goes without saying, right? So if you
24 ask somebody to run 45 search terms against 12 folks and turn
25 those documents around, segregated and corresponding to

1 discovery requests, and get those to you in two weeks, I don't
2 think I need an affidavit on burden to tell you that that is
3 too burdensome, okay?

4 So I think that a lot of what Ms. McCaffrey is saying
5 rings true. You have gotten my ruling on what I'm requiring
6 to be done. I would like a status report from you.

7 MS. MCCAFFREY: Yes, Your Honor.

8 THE COURT: How soon do you think you can get me a
9 meaningful status report on when this could be done?

10 MS. MCCAFFREY: Can I -- I think I need two to three
11 weeks just because of the collection. The client still isn't
12 in the office, so everything has to be remotely. Three weeks,
13 and I will try to get it in earlier, Judge. I will literally
14 walk out of here and call the client and see what we can get
15 started on, if that's okay. And to be clear, if I'm
16 collecting, we will also be running the search -- three weeks,
17 Judge, if that's possible.

18 THE COURT: Three weeks for a status report --

19 MS. MCCAFFREY: Yes, Your Honor.

20 THE COURT: -- on where you are on the production.

21 MS. MCCAFFREY: Yes, Your Honor.

22 THE COURT: All right. That's done.

23 Mr. Haviland, I cannot do something like you are
24 asking me, which is rule that the defendants answer
25 interrogatories -- the fifth request for production because,

1 as I read through those requests for production, they have
2 responded. They may not have turned over any documents, but
3 they have voiced objections. They have said what their
4 objections are and why.

5 I don't know your response to their objections yet,
6 and I have given you discovery 101 early in this case, which
7 is if you want me to rule on specific objections, you tell me
8 which objections you want me to rule on, and you tell me why
9 the objections need to be overruled.

10 I'm not just going to go through, pick up 193 item
11 requests to produce and say "answer these" when there are
12 objections there. So that request is denied without prejudice
13 to putting together something cogent, okay?

14 MR. HAVILAND: I will have something to you in a
15 week, Your Honor, because --

16 THE COURT: Good.

17 MR. HAVILAND: -- these were served on June 6th,
18 boilerplate objections, which go -- and Your Honor pointed
19 this out in June: These questions go to the heart of the
20 matter. Now, they have said, "We have already given you the
21 documents," or sometimes they just, tongue-in-cheek, "We are
22 not going to give it to you."

23 I want to give you an example. They produced an
24 expert report --

25 THE COURT: Let me just tell you one thing. I did

1 not -- I knew that you had them, but you didn't bring them to
2 my attention -- I saw them attached somewhere else -- that you
3 had sent out this fifth request for production. I did not sit
4 and go through it. I didn't because it wasn't in front of me,
5 but I knew it had to do with bankruptcy documents.

6 When I looked at the 193 requests that you are
7 making, I haven't decided one way or the other, but I have
8 never insinuated to anybody that I think all of those are
9 proper or that any of them are proper. I simply said that
10 would be a succinct way to get at these new discrete topics
11 that you want. Whether you need 193 document productions to
12 get at these discrete topics, you know, I have a gut reaction
13 to that, but I'm not going to rule on it because there is
14 nothing in front of me, okay?

15 MR. HAVILAND: It couldn't have been in the June
16 hearing, Judge, because they didn't serve the answers until
17 the day before. So we made reference to it because when the
18 Court was asking about post-complaint and this whole
19 arbitrary -- arbitrary -- selection of a date cutoff -- Your
20 Honor said it, and that's what it is -- they just chose it;
21 they unilaterally said, "We are not going to produce documents
22 after the complaint" -- we had served these --

23 THE COURT: It seems to me that that fifth request to
24 produce deals with bankruptcy. Again, I didn't study it
25 because there was 193 there, right? I think they deal

1 predominately with the bankruptcy documents, don't they?

2 MR. HAVILAND: What they deal with, Judge, is the
3 contract, drafts of contract, the new proposed contract.

4 THE COURT: Right, everything that came out of the
5 bankruptcy.

6 MR. HAVILAND: Everything in the divorce.

7 THE COURT: Right. Absolutely. Okay.

8 So I understand that. That's all new information,
9 and I do think that that, to the extent those are relevant,
10 that that is the way to get at this new information, but I
11 think 193 is -- you know, I just think you guys need to work
12 that out somehow and bring to me what your issues are.

13 MS. MCCAFFREY: Judge, we will respond to that. The
14 bankruptcy is not relevant. If he files a motion to compel,
15 we will provide the basis for that, Your Honor.

16 THE COURT: Let me tell you -- I'm just going to give
17 you a brief overview. I think that there are certain parts of
18 the bankruptcy -- information that came out of the bankruptcy
19 that are relevant, and I think you have hit on them.

20 MS. MCCAFFREY: Yes, we have.

21 THE COURT: You have agreed to give them the
22 testimony on these two, negotiation of your old contract and
23 the negotiation surrounding the new contract or information
24 you have on the new contract.

25 Now, I don't know if there are other things that came

1 out of the bankruptcy that might be relevant because I'm not
2 involved in the bankruptcy, okay? But I would think that to
3 the extent that there are things that go to your client's
4 involvement with Mallinckrodt such that you were intimately
5 involved with their decisions on Acthar pricing, that could be
6 relevant. I don't know if these documents say that.

7 MS. MCCAFFREY: But, Your Honor, that's not -- first
8 of all, that's not even what these requests -- look, we will
9 respond to an actual motion to compel. That's not what those
10 were. That's not what this is about. I'm struggling with how
11 that, then, overlays with the full supplementation of all the
12 four other requests for production that we are now producing.
13 It all seems duplicative to me at this point. We will take a
14 look. We will see what we can do. So I will provide Your
15 Honor with our bases for why all of that, but except to what
16 we have talked about is irrelevant.

17 THE COURT: Right. Many of those things may be
18 relevant, I don't know, but --

19 MR. HAVILAND: Judge --

20 THE COURT: -- there needs to be -- there definitely
21 needs to be a meet-and-confer about this, and I don't know
22 that there has been, and by a meet-and-confer, I mean each one
23 of these requests, why it's relevant, and, you know, something
24 other --

25 MR. HAVILAND: We will do that.

1 THE COURT: Okay.

2 MR. HAVILAND: So let me just say, Judge, that these
3 parties tried to get an Article I judge to moot this case.

4 THE COURT: I know. I have heard that. I am
5 intimately familiar --

6 MR. HAVILAND: They tried to get the bankruptcy
7 judge, and --

8 THE COURT: -- with what they asked.

9 MR. HAVILAND: -- they failed. So how they got to
10 that failure is how we get to the end of this case.

11 THE COURT: But here is the thing, Mr. Haviland: I
12 understand you believe deeply in your case. Defense counsel
13 believes deeply in her case, okay? What you are doing that is
14 frustrating me and that is not in you or your client's best
15 interests is you are asking me to do your work, and I am not
16 going to do your work.

17 You did not sit down with defense counsel and go
18 through those interrogatories or those requests to produce and
19 limit them to a succinct number of interrogatories or requests
20 to produce that you want me to rule on and why I should
21 overrule the objections.

22 I'm not going to do your work for you, and if you
23 don't do it, we are going to move on to the next issue.
24 That's what frustrates me.

25 MR. HAVILAND: I will sit down with Ms. McCaffrey for

1 as long as it takes to go through every one of these requests
2 and explain our position and have her explain her objections.
3 We will codify that in a mutual submission, and then we will
4 move if appropriate.

5 THE COURT: Right, and I can sit here and I can go
6 through them, one, two, three, four; overruled, sustained,
7 overruled, sustained.

8 MS. MCCAFFREY: Well, hopefully, it is not through
9 193, Judge, but we will see what we can do.

10 MR. HAVILAND: Well, we are going to go through them
11 all, Judge.

12 THE COURT: Well, you are going to go through all of
13 them, but I certainly hope that there is going to be some
14 agreement on some of them. I have already indicated
15 essentially what I think is relevant from that, but my ears
16 are open once the work is put into it.

17 I looked at the joint statement that the parties
18 filed on the depositions. It looks like we are starting. We
19 had a July 26th deposition of Mr. Shirey. It looks like we
20 have got something scheduled to go August 18th.

21 MR. HAVILAND: Right.

22 THE COURT: And I want the parties to stick to that.
23 It looked like there were some open issues.

24 MS. MCCAFFREY: I think there are two, Judge.

25 One is with respect to, I think the day we submitted

1 this filing, plaintiff identified an additional nine witnesses
2 that it is seeking to depose. We had understood and asked
3 plaintiff to provide the complete list of witnesses it
4 intended to depose back in end of April, early May, and we got
5 nine additional witnesses July 20th, when this was filed.

6 This is turning into extremely burdensome,
7 particularly, Judge, because plaintiffs are limited to 50
8 depositions in the case. When you combine that with the
9 depositions that have already occurred, as well as the
10 depositions of Mallinckrodt, there is no way we are under the
11 50 limit right now. So I guess we are asking for guidance
12 from the Court here.

13 We understood that plaintiff was expected to provide
14 everything they wanted so that we could get the schedule
15 nailed down. Nine new additional witnesses is going to be
16 difficult.

17 MR. HAVILAND: Judge, they are not new. In December
18 of 2019, we gave this defendant a list in a long -- and, by
19 the way, we are not asking for all those deponents. What we
20 did is we gave defense counsel the senior people, Mr. Paz,
21 Mr. Wentworth, Mr. Neville, so that they could get working on
22 that schedule because they are the apex. Your Honor has heard
23 that argument, how difficult it is to schedule those.

24 What you had is after we finished our class cert,
25 which was a mammoth test to get done, we gave them the

1 complete list of the 20. Now, they are not new. They were
2 always deponents that were noticed and properly -- by the way,
3 they were scheduled, Judge, before COVID. They were
4 scheduled. And you heard from Mr. Shapland. He is working
5 cooperatively on that same list. We are working with him to
6 winnow that down to the extent folks have left. But none of
7 these people are new, Judge.

8 THE COURT: There is 20 deponents for Express Scripts
9 defendants?

10 MR. HAVILAND: Yes, there are the 12 we talked
11 about --

12 THE COURT: Right. And then there is eight more?

13 MR. HAVILAND: -- and eight formers.

14 THE COURT: All right. So there is 20.

15 Were those, in fact, scheduled before COVID?

16 MS. MCCAFFREY: No, they weren't. They weren't.

17 THE COURT: Did you have the list of 20 before?

18 MS. MCCAFFREY: They provided a list in December of
19 2019, Judge, if you remember. There were like 50-something
20 witnesses.

21 THE COURT: Right, and we had to cut them down.

22 MS. MCCAFFREY: And we had to cut them down. These
23 people weren't on that list. So what we went back to -- and,
24 frankly, okay, December 2019, plaintiff's counsel is telling
25 you this is a whole new case. When we sent them a note in

1 April, consistent with Your Honor's order that we get depos
2 scheduled, and we say who do you want to depose, they didn't
3 identify these people.

4 So I don't know why they weren't identified then,
5 which is making it difficult. This is 20 -- I think 22 grand
6 total that I think we are looking for. Obviously, the
7 30(b)(6) is separate. There have already been 13 depositions?

8 MR. HAVILAND: Four.

9 MS. MCCAFFREY: Sorry?

10 Thirteen-something, around 13 depositions that
11 occurred prior to COVID. And then we have got -- I think
12 there are close to 29 Mallinckrodt witnesses that we are
13 talking about.

14 So we are supposed to be at 50. We asked them to
15 give the full list. They don't give it until after
16 this -- you know, right when this filing is going in, and now
17 we are kind of between a rock and a hard place.

18 THE COURT: Well, it is limited to 50, Mr. Haviland.

19 MR. HAVILAND: Right.

20 THE COURT: And so you better make sure that between
21 Mallinckrodt and Express Scripts it is 50.

22 MR. HAVILAND: We understand that.

23 THE COURT: And we have got 20 here that go all the
24 way up to October 20th. You know, to the extent that those
25 additional -- what are they, eight?

1 MS. MCCAFFREY: Nine.

2 THE COURT: -- nine, that those additional nine fit
3 within your 50 total, I mean, there is only so many days
4 between now and October 18th.

5 MR. HAVILAND: Judge, there was seven that we gave
6 them after we filed our class. I don't know where they get
7 nine. It is seven that were on the original list. But it's
8 20. It's 20.

9 And, Judge, Judge Johnston spent an entire day with
10 the parties working out limits, 50. Seventy-five
11 interrogatories we are going to get to. And we are governed
12 by that.

13 THE COURT: Okay. Good.

14 MR. HAVILAND: So for Express Scripts to be pointing
15 to another now third party and saying, "Hey, what we work out
16 there," we know what the limit is.

17 THE COURT: Perfect.

18 MS. MCCAFFREY: But the limit is 50. If you take
19 into this along with what he is noticing with Mallinckrodt, we
20 are over 50.

21 THE COURT: Yes, it does seem like it.

22 MS. MCCAFFREY: We are definitely over 50.

23 MR. HAVILAND: Judge, I will tell you it is 25 and
24 25, and let me tell you how because it is simple math. Here
25 is who we deposed from Express Scripts: Earl English, Nick

1 Black, Beth Wright, Bill Shirey last week. That is four. The
2 corporate designee is five. Twenty, 25. We may have 25 or
3 less with Mr. Shapland. I don't know whether we are going to
4 get there, but we have 25.

5 MS. MCCAFFREY: He has proposed 29.

6 MR. HAVILAND: But, Judge, as Mr. Shapland pointed
7 out, he doesn't represent folks --

8 MS. MCCAFFREY: Judge --

9 MR. HAVILAND: Excuse me. Can I finish?

10 Third party practice is going to implicate whether or
11 not we are going to pursue. I have listened to Mr. Shapland
12 because he calls me and tells me his problems, as we have with
13 one of our witnesses who just doesn't want to be bothered, and
14 we have told defense counsel, "You are going to have to
15 subpoena them." But at some point, counsel have to make that
16 call. If Mr. Shapland says, "These folks are beyond the
17 pale," we will have to decide whether we pursue that in the
18 next 90 days. But we have said 25 for them, and I don't know
19 that we get to 25 with Mr. Shapland, but that's for them and
20 another day. But to say that we are at 50, we are not at 50.
21 We have had four Express Scripts depositions, four.

22 MS. MCCAFFREY: Well, but this is the problem. He
23 keeps on defining it as Express Scripts. He is limited to 50,
24 regardless of who the depositions are, Judge. That's my
25 concern.

1 MR. HAVILAND: No, that's not the case, Judge. We
2 have third party practice. Judge Johnston was very clear that
3 the party burden -- the party burden -- was 50. If we have to
4 go out and get a third party subpoena of a consultant, whether
5 or not we take that deposition -- I can go back and read the
6 order -- it's 50 because these parties argued that it was a
7 party burden.

8 MS. MCCAFFREY: It is 50 depositions per group,
9 Judge. Each group was defined: Plaintiffs, Mallinckrodt,
10 Express Scripts. Each group gets 50.

11 THE COURT: Yes, I thought we went through this
12 already. I went back and read that --

13 MS. MCCAFFREY: You did in December. I can refer you
14 to it, Judge.

15 THE COURT: I went back and read the transcript. I
16 actually talked to Judge Johnston, too, and said, "What did
17 you mean when you said that?" And he said, "I meant what I
18 said."

19 MS. MCCAFFREY: Exactly. It's at 307. You ruled on
20 it February 7th, 2020.

21 THE COURT: Yes.

22 MR. HAVILAND: Judge, we are counting against the 50
23 that haven't been committed to.

24 THE COURT: Right.

25 MR. HAVILAND: Okay. So we are not there yet. I

1 guarantee you if we get to 49, one of these counsel is going
2 to say we are at 49.

3 MR. SHAPLAND: And just for the record, Your Honor, I
4 appreciate the point that Mr. Haviland just made. He hasn't
5 taken the depositions of the 29 individuals he has asked for
6 among former and current Mallinckrodt executives and board
7 members, but that's the number. Twenty-nine are on the list
8 right now, and six occurred before the bankruptcy. Six
9 Mallinckrodt folks have been deposed. So, you know, from the
10 Mallinckrodt side of things, we are at 35, talking about
11 reaching all the way up to 35.

12 THE COURT: Which may be another reason why you just
13 want to accept the transcripts on those.

14 MR. HAVILAND: Sorry?

15 MS. MCCAFFREY: Judge --

16 MR. HAVILAND: And we might, Judge. Look, that's a
17 reality, yes.

18 MS. MCCAFFREY: If I may, so I understand your ruling
19 on this, Judge, to be to try to figure out if we can get dates
20 for these witnesses. We will try to do that.

21 The second issue relates to Mr. Osborne. Mr. Osborne
22 has been deposed by plaintiff's counsel two times, so over 14
23 hours. There was an agreement at the end of the last
24 deposition in the fall of 2020 that Mr. Osborne would be made
25 available for an additional two hours of deposition.

1 Mr. Osborne has since left CuraScript, so he is no longer with
2 the company. He has moved over to Switzerland. He is working
3 for a new company. He has agreed to come to London, which
4 helps -- frankly, helps plaintiffs because, if not, he has got
5 to go through the Hague in Switzerland and to sit for two
6 hours of deposition per our agreement. Plaintiff's counsel
7 has not committed to limit the deposition to two hours.

8 THE COURT: It is limited to two hours.

9 MS. MCCAFFREY: Thank you.

10 MR. HAVILAND: Your Honor, we want his custodial file
11 so we can do it in two hours because Mr. Osborne was pointed
12 by the president of CuraScript as the guy who knows about
13 these divorce issues.

14 MS. MCCAFFREY: So, Judge, here is the other problem.
15 This is the problem with the proposal. You know who is not on
16 his 12 custodians that he identified? Mr. Osborne. This is
17 what I'm concerned about.

18 MR. HAVILAND: Twenty-one then.

19 MS. MCCAFFREY: So now I have got to add another one
20 to the list of people. I'm worried we are going to be coming
21 back.

22 THE COURT: We are not running search terms against
23 Mr. Osborne because he is -- or is he on the list of who you
24 asked?

25 MS. MCCAFFREY: He is not.

1 THE COURT: He is not on the 12, so we are not
2 running search terms on that.

3 MR. HAVILAND: Beautiful.

4 THE COURT: We can't keep moving the goalposts. I
5 mean, if you wanted him, why wasn't he on the list?

6 MR. HAVILAND: It was an oversight, Judge. We are
7 really busy, and Mr. Osborne --

8 THE COURT: So am I.

9 MR. HAVILAND: -- is out of the queue now. So there
10 we go.

11 THE COURT: I mean, certainly to the extent there are
12 questions about --

13 MR. HAVILAND: The reason why it was an oversight,
14 Judge, and I want it to be clear, because he is still under
15 oath. To say that we have to go into the Hague, the
16 deposition did not conclude. What we were giving defense
17 counsel was a list of the folks that had not been deposed --

18 MS. MCCAFFREY: Judge --

19 MR. HAVILAND: -- and that's why that list was
20 important to get those deposed. Counsel freely reached out,
21 realizing that there was a commitment to bring him back
22 because we didn't complete. He wasn't deposed twice. He was
23 deposed once. He was deposed in Local 542 about the issues in
24 that case. He was deposed once here, and we didn't finish,
25 and we had told counsel we wanted two days.

1 MS. MCCAFFREY: No. Judge --

2 THE COURT: Does Mr. Osborne have intimate knowledge
3 about the renegotiation of these contracts?

4 MS. MCCAFFREY: Yes. This is the problem, Judge. He
5 was a custodian we proposed to give them to supplement in May.
6 They rejected that, okay? And he has already sat for a
7 deposition for 14 hours. We have agreed to coordinate
8 discovery across the cases, Judge. Counsel is on the record
9 on that back in 2019. So he has had 14 hours.

10 There was an agreement at the end of the last one to
11 give two hours. Mr. Haviland is on record as agreeing to
12 those two hours. Mr. Osborne, yes, he is certainly relevant
13 to the purpose of the CuraScript -- the termination of the
14 CuraScript relationship, for lack of a better term, but that's
15 the problem with this scattershot approach and a reply that
16 I'm concerned about. We had already proposed Mr. Osborne
17 because we were looking to identify the discrete set of
18 relevant custodians, and plaintiff said no, and this is what
19 they have come back on. So do they want to drop another
20 witness?

21 MR. HAVILAND: He is the one that they identified.
22 Last week the president said you have to talk to him, but we
23 won't get his documents.

24 MS. MCCAFFREY: Well, then why wasn't he included in
25 this list, Judge? He can drop another custodian.

1 MR. HAVILAND: I can explain why. We were giving
2 them the list of the folks that had not been deposed before,
3 not somebody that was attached already for deposition.

4 MS. MCCAFFREY: That is not what this says.

5 MR. HAVILAND: He was coming back by agreement. He
6 was coming back by agreement, and now he is in Switzerland,
7 and they are going to say we are going to the Hague?

8 THE COURT: He is coming to London.

9 I still don't understand how you are getting
10 documents related to the two agreements. Are they covered by
11 the search terms?

12 MR. HAVILAND: Well, not if they don't search
13 Osborne.

14 THE COURT: Well, even if you search Osborne, are the
15 existing search terms going to pick up?

16 MS. MCCAFFREY: The "wholesale product" search term
17 may get it, Judge. "Acthar," obviously. I mean, this is the
18 drug that is distributed under it.

19 MR. HAVILAND: And "Mallinckrodt."

20 MS. MCCAFFREY: Again, we need a proposal to get
21 this. Two months, Judge.

22 THE COURT: "Acthar" is in the agreement?

23 MS. MCCAFFREY: I believe "Acthar" is in the
24 agreement.

25 THE COURT: So it will be there.

1 MS. MCCAFFREY: It should be there, Judge, as well as
2 the actual -- it is "wholesale product" whatever. That's the
3 title of this contract.

4 MR. HAVILAND: And, Your Honor, Mr. Osborne has left
5 the company, as have a number of other witnesses. So the
6 burden is finite. These folks left in 2020, 2021. So it is
7 not like they have got a current file. They are going to a
8 closed-out file to pull those documents, and Mr. Osborne
9 should be included or we are wasting our time.

10 MS. MCCAFFREY: So now we are adding more custodians.

11 MR. HAVILAND: No, Judge, it is covered by our
12 document requests, okay? It is covered by our document
13 requests. We have a standing document request. I will never
14 forget the first day Judge Johnston asked, "What do you want,
15 Mr. Haviland?" And I said, "I want the contract documents."

16 MS. MCCAFFREY: He has the contract, Judge --

17 MR. HAVILAND: And they were ordered -- no, no, we
18 had an order of this Court that the contract documents related
19 to that contract be produced, and that's an ongoing
20 obligation. We don't have to chase custodians. If he is the
21 guy, then they should produce him.

22 THE COURT: Yes, if he is the guy that was involved
23 in renegotiating or attempting to renegotiate that contract, I
24 don't think we can --

25 MS. MCCAFFREY: Judge --

1 THE COURT: I thought you said he was?

2 MS. MCCAFFREY: He was one of them. He was one of
3 them, and the others are included here. Christie Vivod, for
4 example, was also involved in the negotiations around this
5 contract. So he is not the guy. There are several people
6 that are already here but --

7 MR. HAVILAND: Mr. Shirey testified last week he is
8 the guy. He is the president. He said he is the guy.

9 THE COURT: I don't know if he is the guy or not, but
10 he knows about the renegotiation of the contract. So get the
11 documents related to the renegotiation.

12 MS. MCCAFFREY: The renegotiation of the contract.
13 So any production from Mr. Osborne is limited to the
14 renegotiation of the contract?

15 THE COURT: Yes.

16 MS. MCCAFFREY: Understood.

17 THE COURT: All right. Anything else?

18 What do we do about a -- do we want to schedule a
19 next in-person?

20 MR. HAVILAND: So, Your Honor, we do have our rog
21 issue that was included in our motion to compel.

22 MS. MCCAFFREY: I understood that to be denied.

23 THE COURT: I'm denying it because you didn't do what
24 you need to do. So you can bring --

25 MR. HAVILAND: On the interogs?

1 THE COURT: I mean, I am denying it without prejudice
2 to re-bring it once you have a meet-and-confer and you outline
3 for me why I should overrule whatever objections you can't
4 agree on, right?

5 MR. HAVILAND: I'm sorry, Judge, I thought that was
6 the fifth request for production.

7 THE COURT: It is all of them, right?

8 So my understanding about the interrogatories, are
9 you asking me to just order that they update, or are you
10 asking me to overrule objections?

11 MR. HAVILAND: Yes. So we want responses, Judge. I
12 have a letter attached to my affidavit as Exhibit P, which
13 takes all their objections. It is a six-page letter. It
14 walks through them. It points out to the Court how the
15 interrogatories we are asking are the same ones they asked of
16 my client that we agreed to update and did. I don't know what
17 more I can do. As to the -- and I can tell you what the
18 letter says. As to the burden objection --

19 THE COURT: Which --

20 MR. HAVILAND: Exhibit P to my affidavit.

21 THE COURT: Exhibit E to the --

22 MR. HAVILAND: P -- I'm sorry -- as in Paul.

23 THE COURT: Let me get to it.

24 MS. MCCAFFREY: Judge, I want to be clear. What we
25 actually responded to Mr. Haviland was that we provided these

1 responses and objections in July of 2020. Plaintiff raised a
2 dispute with them in response to our request and
3 identification of their deficient interrogatory responses.
4 They demanded supplementation within a couple of days.

5 What we told them we would do is we would look at
6 these interrogatories. We would look to see what could or
7 could not be supplemented. We anticipated that much of this
8 was going to be -- would relate to expert discovery and expert
9 reports in this case and that likely the appropriate approach
10 here would be to supplement the interrogatory responses once
11 we have served our expert report, which is exactly what
12 plaintiffs themselves did --

13 MR. HAVILAND: In November, Judge, in November.

14 MS. MCCAFFREY: -- the difference being that
15 plaintiff's counsel provided a response, recognized they were
16 deficient almost as soon as they were provided and provided an
17 updated response a month later, after their expert report was
18 filed.

19 MR. HAVILAND: Judge, I don't --

20 MS. MCCAFFREY: What I anticipate our position being,
21 again, we are talking 40 -- 51 interrogatories --

22 THE COURT: Let me get to them first. I'm trying
23 to -- where are the --

24 MR. HAVILAND: So, Your Honor, Exhibit G is the
25 actual responses, G as in George, and P is my letter. We have

1 75 interrogatories ordered by the Court. They have not
2 answered -- have not answered -- 35 of them.

3 THE COURT: Okay. They haven't answered them
4 because they --

5 MR. HAVILAND: Objected.

6 THE COURT: -- objected.

7 I'm now at the --

8 MR. HAVILAND: But I addressed -- so we had a
9 meet-and-confer at the same time that the claimed deficiencies
10 of my client's response were directed, and we agreed to answer
11 the questions and did.

12 What they have not done is committing to amend any.
13 We are hearing, "Wait till November, after the close of
14 discovery, when we get an expert report."

15 MS. MCCAFFREY: That's actually not what we said.

16 MR. HAVILAND: It would take away the device of the
17 interrogatory that the Court gave us. These questions go to
18 the heart of the matter, Judge. They go to -- and I can walk
19 through them.

20 THE COURT: No. Okay. Here is the thing --

21 MR. HAVILAND: And their responses just --

22 THE COURT: -- I started going through these. I do
23 agree that these need to be updated, that a number of these
24 issues are issues that Mr. Haviland identified as information
25 he was -- I mean, I just took a look at a couple of them, and

1 I didn't even get through all of them. I flagged them.

2 All drugs that competed with Acthar during the
3 relevant time period, I thought Mr. Haviland had said that
4 there was some developments in that recently with respect --

5 MR. HAVILAND: Yes, they signed a contract. Judge,
6 that answer is deficient because it says there is none.

7 MS. MCCAFFREY: Judge --

8 MR. HAVILAND: So it has to be updated.

9 MS. MCCAFFREY: Judge, we haven't refused to answer
10 these. I have said give me an opportunity. That's it.
11 That's all we are asking for.

12 THE COURT: Right. So that's my point is that I
13 don't think this is ripe to discuss, the interrogatories, the
14 requests to produce. I want a meet-and-confer. I have said
15 it before. I'm saying it again. I want a meet-and-confer on
16 them. To the extent that defendants are going to stand on
17 their objections, I want you to file a motion telling me why
18 the objections are inappropriate.

19 MR. HAVILAND: We will do it again, Judge.

20 THE COURT: Well, you haven't done it yet,
21 Mr. Haviland.

22 MR. HAVILAND: Judge, my July 20th letter lays out
23 the meet-and-confer. It is right there. I am going to do it
24 again. We will do it again. We will go through every single
25 objection. I couldn't have done it better. Burdensome, we

1 explained why they haven't articulated it. We are asking
2 questions of four entities. That's for them to decide. It's
3 all here. It is the subject of expert testimony.

4 Let me just touch that one. They filed an expert
5 report in bankruptcy. We have asked about that.

6 THE COURT: It is not the subject of expert
7 testimony. It is not. That is not --

8 MR. HAVILAND: I'm sorry?

9 THE COURT: I'm saying that it's not the subject of
10 expert testimony. You are entitled to get those answers. You
11 are going to have a meet-and-confer. I'm going to hear why
12 some of these things are not appropriate or whatever, and I'm
13 going to rule on it, but it is not teed up the way it should
14 be. End of story.

15 All right. Are we going to do another in-person?

16 MS. MCCAFFREY: Judge, I think there is one other
17 issue.

18 MR. LYTTLE: Your Honor, just two quick issues. I
19 know it has been a long day.

20 Number one, there is a suggestion about the
21 depositions from the bankruptcy case. We, obviously, think
22 those are fully admissible at trial. I don't expect you to
23 rule on that. I just want the record clear that you have made
24 no ruling at trial on the admissibility of those depositions
25 taken in the bankruptcy court.

1 THE COURT: I have never even seen them, so --

2 MR. LYTTLE: Thank you.

3 MR. HAVILAND: And we object, Judge. Just so the
4 record is clear, we object to that.

5 MR. LYTTLE: The second point, Your Honor, is we are
6 trying to find a deposition date for their class cert expert,
7 and we proposed a couple of dates in mid-August. Mr. Haviland
8 came back. I guess those didn't work. He proposed some dates
9 at the end of August. Those don't work for us because of
10 vacations and a 20th wedding anniversary, Your Honor. So I
11 would like to -- well, I think we are going to continue to
12 work on that. I'm not asking to rule. But there is a cutoff
13 for that, I believe, at the end of August. If that date slips
14 into September, which is fine with us, are you okay with the
15 parties by consent agreeing to depose Dr. Comanor -- am I
16 saying that right?

17 MR. HAVILAND: Comanor.

18 MR. LYTTLE: -- Comanor in September?

19 THE COURT: I don't have a problem with that.

20 MR. HAVILAND: So, Your Honor, here is the issue. We
21 have given them the entire week of the end of August.
22 Dr. Comanor teaches at the UCLA, and the moment you turn the
23 calendar, everything changes. I haven't asked him about
24 September because of the cutoff. I have no problem with
25 giving them that entire week, but Dr. Comanor doesn't have the

1 flexibility as a teaching professor in September.

2 If they were to propose -- so I responded back -- I
3 don't know why we are doing this on the record -- and gave
4 them an entire week, a whole week, to pick a date, and they
5 couldn't pick one.

6 THE COURT: That's in August? Because he is going on
7 vacation for his wedding anniversary.

8 MR. HAVILAND: I get that, Judge, but I didn't hear
9 that. I didn't hear that.

10 THE COURT: Well, you heard it now.

11 MR. LYTTLE: Your Honor, I think we actually have
12 accepted September 2nd, which is actually in that week. So I
13 haven't heard back. Maybe we have got an agreement. That
14 would be great.

15 MR. HAVILAND: I didn't talk to the professor about
16 September 2nd.

17 THE COURT: So remember -- do you guys remember --

18 MR. LYTTLE: You just said the entire week.

19 THE COURT: Stop.

20 I'm going to end our little session here with sort of
21 a little tip, okay?

22 Do you remember the minute entry that Judge Johnston
23 entered when he started reviewing some of this?

24 MR. HAVILAND: I do.

25 THE COURT: He basically said he is going to come in

1 here, and he is going to -- I mean, all it is going to take is
2 for me to show him the transcript of what goes on in this, and
3 you are going to have a district judge calling you in, and
4 this is going to stop. You are going to get no more rulings
5 from me. You are going to get no more rulings from anyone.
6 He will stop it. And I don't know if either side wants that.

7 But I mean this is becoming really, really
8 ridiculous -- I mean, ridiculous -- that two firms like this
9 behave like this. I have never seen it before. And it is
10 going to stop because my patience is running out. I mean, I
11 am pretty willing to assist the parties in resolving issues,
12 but being thrown this kind of stuff -- people filing things
13 without leave of Court, people disregarding what I say -- I
14 mean, at some point, my patience will run out, and then this
15 whole exercise will stop for both sides.

16 So you guys need to step back, step down, and think
17 about if that's what you really want because it can't
18 continue. I am not going to sit here and look through 196
19 interrogatories and rule on every single one. I'm just not
20 going to do it, and I don't know of any judge that would do
21 that without specific objections and case law citations and
22 several meet-and-confers in person where the two main parties
23 are meeting, not associates, and trying to resolve it. That's
24 all I'm going to say on it.

25 I'm going to set a next status for a month. If the

1 parties need to come in sooner, let me know.

2 MS. MCCAFFREY: Is that the 7th, Judge?

3 THE COURT: I'm just looking to see if we can do the
4 7th.

5 I cannot do the 7th.

6 We can do it Thursday, the 8th, Veronica, at 11:00?

7 THE CLERK: Yes, we can do that, Your Honor.

8 MS. MCCAFFREY: That's fine for us.

9 THE COURT: That may be a day you guys have already
10 set for depositions.

11 MS. MCCAFFREY: We actually do. We have got a
12 deposition on September 8th in St. Louis.

13 THE COURT: Well, let's not do that, then. I don't
14 want to --

15 MS. MCCAFFREY: Well, there are also lots of
16 attorneys. So I imagine --

17 MR. HAVILAND: I don't know if that is a Rockford
18 witness, in which case we would be here.

19 MS. MCCAFFREY: No, it is Bill Martin in St. Louis.

20 THE COURT: I could do Friday, the 9th.

21 MS. MCCAFFREY: That's fine.

22 MR. HAVILAND: Let me just check, Judge.

23 THE COURT: And we don't need to do an in-person if
24 there is -- I mean, we can wait and schedule it if there is
25 something that needs to be argued.

1 MR. PLATT: Your Honor, may I make a suggestion? I
2 know that we have like three or four Rockford witnesses being
3 deposed the week of the 20th of September.

4 MR. HAVILAND: That's late.

5 MS. MCCAFFREY: That's late.

6 MR. PLATT: But if it is necessary, and we can't -- I
7 mean, I don't know if you want to have it in-person. If you
8 want to have it over the phone instead, it would save --

9 THE COURT: I just don't want to get into a situation
10 where we are having a long argument on written discovery. I
11 don't want to do that over the phone. That is just too
12 difficult.

13 If we are just going to have a status and we are not
14 going to be arguing motions, there is no reason to do it in
15 person. So I don't want to set these things up to make -- you
16 guys already have a completely full schedule on this case.
17 I'm willing to hold off --

18 MR. HAVILAND: Judge, the week of the 29th is open.
19 I mean, that's --

20 THE COURT: I'm sorry?

21 MR. HAVILAND: The 29th, there is nothing scheduled.

22 THE COURT: The 29th of when?

23 MR. HAVILAND: August.

24 THE COURT: I'm out that week. Sorry.

25 MS. MCCAFFREY: Judge, to credit your point, how

1 about why don't we aim for September 9th. Maybe we can
2 try -- hopefully, we will resolve the issues, and if there are
3 limited disputes, maybe we can do it over the phone.

4 THE COURT: Absolutely.

5 MS. MCCAFFREY: And then if we are not able to do
6 that, Mr. Platt is correct, there will be some contingent here
7 in Rockford in person in September that if we need any further
8 additional guidance from the Court, maybe we can do it in
9 person at that point.

10 THE COURT: Let's do a placeholder for September 9th,
11 for a next status, at 11:00 o'clock. The parties will let me
12 know no later than the 6th whether they want to do that in
13 person or by telephone, and you can just file something or let
14 Veronica know.

15 MS. MCCAFFREY: Okay.

16 THE COURT: Okay.

17 MR. HAVILAND: Thank you, Your Honor.

18 MS. MCCAFFREY: Thank you, Your Honor.

19 MR. PLATT: Thank you.

20 (Which were all the proceedings heard.)

21 CERTIFICATE

22 I certify that the foregoing is a correct transcript from
23 the record of proceedings in the above-entitled matter.

24 /s/Heather M. Perkins-Reiva

August 8, 2022

25 Heather M. Perkins-Reiva
Official Court Reporter

Date